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No. _____

In The

# Supreme Court of the United States

October Term, 1993

BANCA NAZIONALE DEL LAVORO,

*Petitioner,*

v.

SMS HASENCLEVER GmbH,

*Respondent.*

**Petition For Writ Of Certiorari**
**To The Supreme Court Of Georgia**
**And The Court Of Appeals Of Georgia**

## PETITION FOR WRIT OF CERTIORARI

WALTER W. DRIVER, JR.
RICHARD A. SCHNEIDER
*Counsel of Record*
KING & SPALDING
191 Peachtree Street
Atlanta, Georgia 30303
(404) 572-4600

*Counsel for Petitioner*
*Banca Nazionale del Lavoro*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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## QUESTION PRESENTED

When the Export Administration Act and the Anti-boycott Regulations opposing the Arab boycott against Israel provide that Banca Nazionale del Lavoro's ("BNL's") Atlanta Agency *cannot* forward anti-Israeli letter of credit documents for reimbursement, did the Georgia Court of Appeals violate federal law by ruling that BNL *can* forward them and must accept them for payment?

TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

OPINIONS BELOW ..... 2

JURISDICTION ..... 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 3

STATEMENT OF THE CASE ..... 5

A. Introduction ..... 5

B. Statement of Facts ..... 7

C. Proceedings Below ..... 10

REASONS FOR GRANTING THE WRIT ..... 13

THE COURT SHOULD GRANT CERTIORARI BECAUSE THE STATE COURT HAS (1) CONTRADICTED UNITED STATES PUBLIC POLICY OPPOSING THE ARAB BOYCOTT OF ISRAEL, (2) IGNORED THE POSITION OF THE ANTIBOYCOTT OFFICE, AND (3) OVERRIDDEN THE INTENT REQUIREMENT AND THE ABSOLUTE DEFENSE TO PAYMENT UNDER THE ANTIBOYCOTT STATUTE AND REGULATIONS ..... 13

A. The Georgia Court Of Appeals Ignored The Position Of The Antiboycott Office And Created A Subjective Intent Exception That Contradicts The Antiboycott Regulations ..... 15

B. The EAA Provides BNL With A Complete Defense To Any Obligation To Accept And Pay On The Anti-Israeli Documents Submitted By SMS ..... 18

TABLE OF CONTENTS – Continued

Page

1. Both The Legislative History And The Statute Demonstrate An Intent To Provide A Bank In BNL's Circumstances With A Complete Defense To Payment..... 18

2. 50 U.S.C. App. § 2407(a)(1)(F) Provides BNL With A Complete Defense To Payment ..... 21

3. A Bank Is Vested With Statutory Protection In Enforcing And Complying With The Antiboycott Regulations..... 23

CONCLUSION ..... 25

APPENDIX:

A. Order of the Georgia Supreme Court dated March 18, 1994.....1a

B. Opinion of the Georgia Court of Appeals dated October 28, 1993.....2a

C. Order and Judgment of the Superior Court of Fulton County dated December 23, 1992.....8a

D. Order of the Georgia Court of Appeals dated December 14, 1993.....11a

E. Order of the Georgia Supreme Court dated April 8, 1994.....12a

F. Letter from Office of Antiboycott Compliance dated January 18, 1991.....13a

G. List of Entities Owned 10% or More By BNL... 15a

## TABLE OF AUTHORITIES

Page

### CASES

*Arkansas La. Gas Co. v. Hall*, 453 U.S. 571 (1981)..... 15

*Briggs & Stratton Corp. v. Baldridge*, 539 F. Supp. 1307 (E.D. Wis. 1982), *aff'd*, 728 F.2d 915 (7th Cir.), *cert. denied*, 469 U.S. 826 (1984).....16, 20

*Bulk Oil (Zug) A.G. v. Sun Co., Inc.*, 583 F. Supp. 1134 (S.D.N.Y. 1983), *aff'd*, 742 F.2d 1431 (2d Cir.), *cert. denied*, 469 U.S. 835 (1984)..... 20

*Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981)..... 15

*Hicks v. Cantrell*, 803 F.2d 789 (4th Cir. 1986)..... 15

*Edward Katzinger Co. v. Chicago Metallic Mfg. Co.*, 329 U.S. 394 (1947)..... 17

*Kolovrat v. Oregon*, 366 U.S. 187 (1961)..... 17

*United States v. Meyer*, 864 F.2d 214 (1st Cir. 1988).....16, 17

### STATUTORY AND CONSTITUTIONAL PROVISIONS

28 U.S.C. § 1257..... 2

50 U.S.C. App. § 2402..... 19

50 U.S.C. App. § 2407..... *passim*

O.C.G.A. § 11-5-103..... 7

O.C.G.A. § 11-5-107..... 7

U.S. Const., art. VI..... 3

TABLE OF AUTHORITIES – Continued

Page

REGULATIONS

15 C.F.R. Part 769 ..... 6

15 C.F.R. § 769.1 ..... 4, 12, 16, 17

15 C.F.R. § 769.2 ..... *passim*

OTHER AUTHORITIES

H.R. Rep. No. 190, 95th Cong., 1st Sess. (1977), reprinted in 1977 U.S.C.C.A.N. 362, 365 ..... 19

S. Rep. No. 104, 95th Cong., 1st Sess. (1977) .... 16, 21, 25

Uniform Customs and Practice for Documentary Credits ..... 7, 10

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## Petition For Writ Of Certiorari To The Supreme Court Of Georgia And The Court Of Appeals Of Georgia

## PETITION FOR WRIT OF CERTIORARI

Banca Nazionale del Lavoro petitions the Court for a writ of certiorari to review a judgment of the Georgia Court of Appeals as to which review on certiorari was denied by the Supreme Court of Georgia.[1]

[1] The parties to this case are Banca Nazionale del Lavoro ("BNL") and SMS Hasenclever GmbH ("SMS"). BNL is an international bank owned principally by the Republic of Italy and has holdings of 10% or more in the entities listed on p. 15a of the Appendix (holdings of less than 10% are not listed).

## OPINIONS BELOW

The Order and Judgment of the Superior Court of Fulton County, Georgia, granting summary judgment against BNL and denying BNL's motion for summary judgment and motion to dismiss, is reproduced at pages 8a-10a of the Appendix to this Petition ("Pet. App."). The opinion of the Georgia Court of Appeals affirming the judgment of the Superior Court of Fulton County is reported at 211 Ga. App. 360, 439 S.E.2d 502, and is reproduced at Pet. App. 2a-7a. The Order of the Georgia Court of Appeals denying BNL's motion for reconsideration is reproduced at Pet. App. 11a. The Order of the Georgia Supreme Court denying BNL's petition for certiorari is reproduced at Pet. App. 1a, and the Georgia Supreme Court's Order denying BNL's motion for reconsideration is reproduced at Pet. App. 12a.

## JURISDICTION

The Order of the Georgia Supreme Court denying BNL's petition for certiorari was entered on March 18, 1994, and the Georgia Supreme Court denied BNL's motion for reconsideration on April 8, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a), to review a final judgment by the highest court of the State of Georgia in which decision could be had and in which rights, privileges and immunities under the Constitution and laws of the United States are at issue.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional, statutory and regulatory provisions at issue are:

U.S. Const., art. VI provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

The Export Administration Act ("the EAA"), 50 U.S.C. App. § 2407(a)(1)(F) provides:

> (a) Prohibitions and exceptions
>
> (1) For the purpose of implementing the policies set forth in subparagraph (A) or (B) of paragraph (5) of section 3 of this Act [section 2402(5)(A) or (B) of this Appendix], the President shall issue regulations *prohibiting any United States person,* with respect to his activities in the interstate or foreign commerce of the United States, from taking or knowingly agreeing to take any of the *following actions with intent to comply with, further, or support any boycott fostered or imposed by a foreign country against a country which is friendly to the United States and which is not itself the object of any form of boycott pursuant to United States law or regulation*:
>
> * * *
>
> (F) Paying, honoring, confirming, or *otherwise implementing a letter of credit* which contains any

> condition or requirement compliance with which is prohibited by regulations issued pursuant to this paragraph, *and no United States person shall, as a result of the application of this paragraph, be obligated to pay or otherwise honor or implement such letter of credit.*

(Emphasis added).

The regulations, 15 C.F.R. §§ 769.1(e)(5), 769.2(d)(1), and 769.2(f)(5) state:

> (5) Reason or purpose can be proved by circumstantial evidence. For example, if a person receives a request to supply certain boycott information, the furnishing of which is prohibited by this part, and he knowingly supplies that information in response, he clearly intends to comply with that boycott request. It is irrelevant that he may disagree with or object to the boycott itself. Information will be deemed to be furnished with the requisite intent if the person furnishing the information knows that it was sought for boycott purposes. On the other hand, if a person refuses to do business with someone who happens to be blacklisted, but the reason is because that person produces an inferior product, the requisite intent does not exist.

15 C.F.R. § 769.1(e)(5).

> (1) No United States person may furnish or knowingly agree to furnish information concerning his or any other person's past, present or proposed business relationships: (i) With or in a boycotted country; (ii) With any business concern organized under the laws of a boycotted country; (iii) With any national or resident of a boycotted country; or (iv) With any other

> person who is known or believed to be restricted from having any business relationship with or in a boycotting country.

*Id.* § 769.2(d)(1).

> (5) Compliance with this section shall provide an absolute defense in any action brought to compel payment of, honoring of, or other implementation of a letter of credit, or for damages resulting from failure to pay or otherwise honor or implement the letter of credit. This section shall not otherwise relieve any person from any obligations or other liabilities he may incur under other laws or regulations, except as may be explicitly provided in this section.

*Id.* § 769.2(f)(5).

## STATEMENT OF THE CASE

### A. Introduction

This is a case of great importance to the public because the opinion of the Court of Appeals contradicts United States public policy opposing Arab boycotts against Israel. The Arab boycotts against Israel encourage businesses not to obtain goods from Israel and to include in their shipments of goods to Arab countries invoices containing language stating that the goods do not come from Israel. The United States opposes such boycotts through its federal antiboycott laws, which, among other things, prohibit banks in the United States from negotiating letter of credit documents that promote the Arab boycott and contain anti-Israeli language. *See* Export Administration Act, 50 U.S.C. App. § 2407 *et seq*, and its

attendant regulations (hereinafter referred to as the "Antiboycott Regulations"), 15 C.F.R. Part 769.

In this case, a German company, SMS Hasenclever GmbH ("SMS"), submitted to the Atlanta, Georgia agency office of BNL, letter of credit documents gratuitously containing prohibited anti-Israeli language supportive of the Arab boycott against Israel. (R411-15).[2] SMS demanded more than $17 million in payment. The letters of credit did not require the anti-Israeli language, but such language was added by SMS on its own initiative. Adhering to the federal antiboycott laws, BNL asserted that SMS' documents were unacceptable, Pet. App. 3a, and that under federal law, BNL could not be required to pay on them, having under the EAA an absolute defense against payment or other further implementation of the letter of credit. The Court of Appeals nonetheless affirmed summary judgment against BNL, ordering BNL to accept SMS' anti-Israeli documents and requiring BNL to pay SMS more than $17 million on them.

BNL respectfully submits that the Court of Appeals' ruling is inconsistent with federal law. Under federal law, when a letter of credit beneficiary (SMS) submits offensive documents, the federal statute and regulations relieve BNL of any obligation to pay. Federal law protects BNL from the quandry of having to pay SMS on offensive documents that SMS created, but then being unable, because of SMS' offending language, to negotiate the documents and be repaid. Under the Supremacy Clause

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[2] Citations are to the record in the Georgia Court of Appeals and are to the record page.

of the United States Constitution, the Georgia Court of Appeals was required to follow federal law. Its decision is contrary to both federal law and U.S. public policy and should be reversed.

**B. Statement of Facts**

SMS contracted to sell manufacturing goods to Iraq. (*See* R714-6, ¶¶ 15-17, 25). To pay for these goods, the Iraqi government purchaser arranged for the Central Bank of Iraq ("CBI" or "the issuing bank") to issue two letters of credit in favor of SMS. (R712, ¶ 6). As SMS shipped goods to Iraq and they arrived on site, SMS was to seek payments under the letters of credit by submitting to the paying bank specified documents – *i.e.*, invoices and other documents proving and providing title to the shipments.

After CBI issued the two letters of credit, SMS arranged for them to be "confirmed" in the United States by BNL's banking agency in Atlanta, Georgia ("BNL-Atlanta"). BNL-Atlanta issued two "confirmations" of the CBI letters of credit in favor of SMS entitled BNL Advice Nos. 11751 and 11752. (R724-33). "Confirmations" are written undertakings by one bank to honor another bank's letter of credit and to pay the beneficiary directly upon the beneficiary's submission to the confirming bank of the precise documents called for by the letter of credit. O.C.G.A. §§ 11-5-103(1)(f), 11-5-107(2); Uniform Customs and Practice for Documentary Credits ("UCP"), art. 10(b). If the documents are strictly in compliance, the confirming bank (BNL) pays the beneficiary (SMS) and *then*

*forwards the documents* to the issuing bank (CBI) to obtain reimbursement from the issuing bank (CBI).

SMS requested payments with respect to four sets of documents submitted to BNL under this confirmation procedure. The first two sets of documents were presented in July 1990 seeking two payments in the amounts of $8,278,200 and DM (Deutschmarks) 7,170,000. (R411-15, 714, ¶¶ 16-17). Upon reviewing the documents, BNL discovered that the invoices and certificates contained offensive and prohibited anti-Israeli clauses. The invoices stated: "We declare that the goods are neither of Israeli origin nor do they contain Israeli materials nor are they beeing [sic] exported from Israel." Pet. App. 3a. *These clauses were not called for by the letters of credit* but were added gratuitously by SMS in an apparent effort by the German company to support the Arab boycott against Israel.

These clauses are referred to as "boycott language" consisting of "negative statements of origin" stating that the goods did not come from Israel. (R412, 415). Such clauses are often requested by Arab countries to support their boycott against Israel. United States law prohibits the use of such anti-Israeli documents in the United States. *See* 15 C F.R. § 769.2. One of the key enforcement tools of this United States public policy is that the Antiboycott Regulations require U.S. banks handling letter of credit documents containing anti-Israeli statements to refuse to accept and negotiate offending documents in the circumstances identified in the Antiboycott Regulations. *See id.* § 769.2(d), § 769.2(f).

Pursuant to these regulations, BNL immediately rejected the two sets of offending, anti-Israeli documents

presented by SMS. (R715, ¶ 18). BNL later requested the position of the United States Office of Antiboycott Compliance (the "Antiboycott Office") and was advised that the anti-Israeli clauses in the SMS documents would, under federal law, preclude BNL from forwarding them in accordance with the letter of credit transaction. (R409). According to the Antiboycott Office, "[i]f the bank transmits the . . . [SMS documents with] . . . the negative certificates of origin, it will be in violation of section 769.2(d) of the Export Administration Act, which is the prohibition against furnishing information about business relationships with boycotted countries or blacklisted persons." Pet. App. 13a (Letter of January 18, 1991, from Bureau of Export Administration Acting Director, Compliance Policy Division).[3] Therefore, BNL refused to accept the documents (1) because they do not comply with the letter of credit since they cannot be forwarded, and (2) because BNL is prohibited by federal law from implementing and completing the letter of credit transaction as contemplated by accepting the documents, making payment and forwarding them to CBI to obtain reimbursement.

In November 1990, SMS submitted to BNL two additional sets of documents purporting to show that the shipments covered by the documents SMS submitted to

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[3] The Antiboycott Office advised BNL that if it transmitted the documents "without deleting the negative statements of origin, it will be in violation of section 769.2(d). . . . " Pet. App. 13a-14a. The documents at issue are legally attested and certified documents that BNL could not change. (R411-15). The language could not be deleted and the documents could not be forwarded. (R409).

BNL in July 1990 had arrived in Iraq. *See* Pet. App. 4a. BNL rejected SMS's request for these arrival-on-site payments. *Id.* Although the November 1990 documents did not contain negative certificates of origin, BNL was prevented from making additional payments under the letters of credit because payment of all preceding installments was a mandatory condition precedent that could not be fulfilled as originally contemplated without violating the Antiboycott Regulations.[4]

### C. Proceedings Below

In June 1991, SMS sued BNL in the Superior Court of Fulton County seeking damages for alleged wrongful dishonor of its demands for payment. SMS claimed that the Antiboycott Office had misread the Antiboycott Regulations in stating that BNL could not forward SMS' documents. BNL denied liability, and raised the federal Antiboycott Regulations in its Answer. *See* Answer, Fourth Defense ("Plaintiff submitted documents with improper boycott language, interfering with BNL's ability to pursue reimbursement, and plaintiff is therefore barred from insisting on payment on said documents.")

The parties thereafter filed cross-motions for summary judgment. BNL raised the federal question asserted

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[4] The UCP, the international Uniform Customs and Practice for Documentary Credits, was expressly incorporated into BNL's confirmations of the CBI letters of credit, and it provides that subsequent installments in a letter of credit cease to be available when prior installments have not been properly drawn. *See* UCP art. 45.

in this petition in its first brief on its initial motion for summary judgment, asserting that "the anti-boycott regulations indicate that there is no obligation to pay when the documents presented for payment cannot be forwarded due to an anti-boycott violation." Brief in Support of Defendant BNL's Motion for Summary Judgment (Mar. 16, 1992), p. 12. BNL later argued that "[t]he regulations themselves reflect an underlying principle that, when compliance with the regulations interferes with the normal operations of a transaction, the complying party must be freed of any obligation to pay. *See* [15] C.F.R. § 769.2(f)(1)(5). . . . If the price of compliance with federal law meant that a bank would incur a loss under state law, disincentives to compliance would arise and the federal regulatory scheme would be adversely affected." BNL's Brief (Nov. 2, 1992), p. 18.

BNL also moved to have the Antiboycott Office declared to be an indispensable party with respect to any claim by SMS that sought to challenge the position of the Antiboycott Office. In December 1992, the Superior Court of Fulton County granted SMS' motion for summary judgment and denied BNL's motions, without opinion, and issued an Order and Judgment awarding SMS the sum of $17,309,638.77, plus interest. *See* Pet. App. 8a.

BNL appealed to the Georgia Court of Appeals, raising the federal question presented here and other defenses, asserting that:

> Even if letter of credit law did not relieve BNL of any obligation to pay the SMS documents containing anti-Israeli clauses, the federal law applicable here would dictate that result. Specifically, the EAA and the Antiboycott Regulations

> establish absolute defenses to any payment obligations under a letter of credit when implementation of the letter of credit is prohibited by the statute and the regulations. *See* 50 U.S.C. App. § 2407(a)(1)(F); 15 C.F.R. § 769.2(f)(5).

Brief of Appellant at 20-21. BNL argued that it was entitled to a complete defense since the Antiboycott Office had informed BNL that under the Antiboycott Regulations, BNL could not forward SMS' documents.

In October 1993, the Georgia Court of Appeals affirmed the rulings against BNL. Pet. App. 2a-7a. Without addressing the Antiboycott Office's express instruction that BNL *cannot* forward the anti-Israeli documents, the Court of Appeals theorized *sua sponte* that BNL would be able to forward them if it did so with good intent. Pet. App. 5a. The court stated that no violation of the Antiboycott Regulations can arise unless there is action taken with intent to support the Arab boycott, and inferred that it would not be a violation of the Antiboycott Regulations for BNL to forward the documents unless BNL had intent to support the boycott. The court ruled that BNL could not use its own intent to create a defense to a letter of credit obligation. *Id.*

The court did not address the Antiboycott Office's position flatly prohibiting BNL from forwarding the documents without reciting any exception for good intent. The opinion also did not address that the Antiboycott Regulations dictate that prohibited intent automatically exists merely if documents known to contain anti-Israeli language are forwarded nor did it address that the Regulations absolutely forbid the forwarding of known anti-Israeli documents. *See* 15 C.F.R. § 769.1(e)(5).

After the Court of Appeals denied BNL's motion to reconsider, BNL petitioned the Georgia Supreme Court for a writ of certiorari, again raising its federal defense under the EAA. BNL Petition for Certiorari to the Georgia Supreme Court at 1. The Georgia Supreme Court denied BNL's petition without opinion on March 18, 1994. Pet. App. 1a. BNL filed a motion for reconsideration in the Georgia Supreme Court, which the Court denied without opinion on April 8, 1994. Pet. App. 12a.

## REASONS FOR GRANTING THE WRIT

### THE COURT SHOULD GRANT CERTIORARI BECAUSE THE STATE COURT HAS (1) CONTRADICTED UNITED STATES PUBLIC POLICY OPPOSING THE ARAB BOYCOTT OF ISRAEL, (2) IGNORED THE POSITION OF THE ANTIBOYCOTT OFFICE, AND (3) OVERRIDDEN THE INTENT REQUIREMENT AND THE ABSOLUTE DEFENSE TO PAYMENT UNDER THE ANTIBOYCOTT STATUTE AND REGULATIONS.

The national policy of the United States is to prevent United States persons from facilitating unauthorized boycotts of countries friendly to the United States. 50 U.S.C. App. § 2407. This law applies to prohibit support of the Arab boycott against Israel. *See* pages 19-20, *infra*. Congress instructed the President to promulgate regulations prohibiting United States persons from engaging in activities supporting such disfavored boycotts. The President's delegate, the Secretary of Commerce, promulgated the Antiboycott Regulations, which prohibit United States persons from implementing transactions involving anti-

Israeli documents. The Antiboycott Regulations require U.S. banks given anti-Israeli documents to refuse to negotiate them where doing so, in implementing a letter of credit or otherwise, would violate the regulations. *See, e.g.*, 15 C.F.R. § 769.2(d), § 769.2(f).

Here, the Antiboycott Office advised BNL that the Antiboycott Regulations prohibit BNL from forwarding the SMS documents containing anti-Israeli language. Pet. App. 13a. Since BNL cannot forward the documents to complete the implementation of the letter of credit, BNL has refused to accept and pay on the offending documents. The Georgia Court of Appeals ignored the pronouncement of the Antiboycott Office, however, and ruled that BNL could forward the documents with good intent. The court thus contradicted the Antiboycott Regulations, as well as the interpretation of the Antiboycott Office and other federal courts, and undermined United States public policy against the use of known anti-Israeli documents.

This Court should grant certiorari to decide whether the Court of Appeals has properly determined that known anti-Israeli documents can be forwarded under the Antiboycott Regulations and to decide whether United States banks that must comply with the Antiboycott Regulations are vested with the absolute defense provided by the statute when compliance with the Regulations precludes complete implementation of a transaction.

### A. The Georgia Court of Appeals Ignored The Position Of The Antiboycott Office And Created A Subjective Intent Exception That Contradicts The Antiboycott Regulations.

BNL demonstrated to the Court of Appeals that it could not be required to pay SMS because BNL was flatly prohibited from forwarding SMS' documents by the Antiboycott Regulations. Instead of addressing the flat prohibition contained in the Antiboycott Regulations against forwarding the documents, the court created a subjective intent exception that would allow BNL to forward the documents. The Court inferred that BNL could forward the documents, even though they are known to contain anti-Israeli language, so long as BNL did so with no subjective intent to support the Arab boycott. This interpretation is contrary to both the pronouncement of the Antiboycott Office and federal law.

First, the Antiboycott Office stated that BNL "*will* be in violation" of 15 C.F.R. § 769.2(d), if it forwarded the documents; it did not recognize any exception for good intent. *See* Pet. App. 13a (emphasis added). It undermines federal policy, as well as the supremacy of federal law, for a state court to contradict a federal agency's interpretation of the law that the federal agency is charged with administering. *See Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 581-82 (1981); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 324 (1981). In addition, the Antiboycott Office's letter interpretation of the Regulations is entitled to considerable deference. *See Hicks v. Cantrell*, 803 F.2d 789, 791, 794 (4th Cir. 1986).

Second, the governing federal standard, which is elucidated in the EAA's legislative history, the Antiboycott Regulations and the governing EAA caselaw, is as follows: a United States person automatically possesses the "intent to comply with, further, or support" an unsanctioned boycott, 50 U.S.C. App. § 2407(a)(1), merely if he or she furnishes information *knowing* it is *boycott-related*, even if the party has no actual intent to support the boycott. *See United States v. Meyer*, 864 F.2d 214, 218 (1st Cir. 1988); *Briggs & Stratton Corp. v. Baldridge*, 539 F. Supp. 1307, 1313 (E.D. Wis. 1982), *aff'd*, 728 F.2d 915 (7th Cir.), *cert. denied*, 469 U.S. 826 (1984). *See also* S. Rep. No. 104, 95th Cong., 1st Sess. 40 (1977) (hereinafter "Senate Report"). The Georgia Court of Appeals failed to acknowledge that mere knowledge of a document's boycott content gives rise to the necessary intent. If known boycott language is forwarded, there is a violation; actual subjective intent to support the boycott is not required. *See Briggs & Stratton*, 539 F. Supp. at 1313; 15 C.F.R. § 769.1(e)(5).

The definition of "intent" contained in the EAA Regulations establishes that BNL would have the intent proscribed by the regulations simply by forwarding the SMS documents with the now unavoidable knowledge that they contain information that was solicited for boycott purposes. *See* 15 C.F.R. § 769.1(e)(5).[6] Since SMS'

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[6] Section 769.1(e)(5) provides in pertinent part.

(5) Reason or purpose can be proved by circumstantial evidence. For example, if a person receives a request to supply certain boycott information, the furnishing of which is prohibited by this part, and he knowingly supplies that information in response, he

documents contain boycott language and since BNL knows from reading SMS' documents that they contain this language, BNL cannot avoid having the requisite intent.

The opinion of the Georgia Court of Appeals fundamentally contradicts the intent requirement under federal law. This Court should grant certiorari to correct the Georgia court's failure to apply controlling federal law, *see Kolovrat v. Oregon*, 366 U.S. 187, 191 (1961) (involving state court construction of a federal treaty), and to resolve the conflict in the construction of the Act's intent requirement given by the Georgia Court of Appeals and the United States Court of Appeals for the First Circuit in *Meyer. See Edward Katzinger Co. v. Chicago Metallic Mfg. Co.*, 329 U.S. 394, 398 (1947).

Due to its faulty interpretation of the intent requirement, the Georgia Court of Appeals held that if BNL forwarded the SMS documents to Iraq, it would only "hazard" a violation of federal law, Pet. App. 6a, and that "any future difficulty BNL may encounter in presenting documents to CBI for reinbursement [sic] because of a violation of [the EAA] would necessarily be the result of its own violation of federal antiboycott law," *id.* at 5a. The Court mistakenly concluded that BNL would have to have a subjective bad intent before a violation would

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> clearly intends to comply with that boycott request. It is irrelevant that he may disagree with or object to the boycott itself. *Information will be deemed to be furnished with the requisite intent if the person furnishing the information knows that it was sought for boycott purposes. . . .*

15 C.F.R. § 769.1(e)(5) (emphasis added).

arise, but subjective intent is not required and is not a defense; the Antiboycott Regulations prohibit the forwarding of known anti-Israeli language and the disabling intent arises as soon as the content of the document is known. Since BNL knows the content of the documents and knows that SMS has included offensive language on its own initiative, BNL cannot forward the documents. If BNL tried to forward the documents now, violation of federal law would be a certainty, not merely "a hazard." Pet. App. 6a. The Office of Antiboycott Compliance has so advised BNL.

In addition to being incorrect, the Court of Appeals' holding undermines public policy against the use of anti-Israeli documents. Under the Court's ruling, known anti-Israeli documents could be forwarded under the veil of good intent. Yet, the regulations are designed to stamp out the use of anti-Israeli documents, not to facilitate their use. The Court of Appeals' intent analysis is flawed, and its judgment should be reversed.

### B. The EAA Provides BNL With A Complete Defense To Any Obligation To Accept And Pay On The Anti-Israeli Documents Submitted By SMS.

#### 1. Both The Legislative History And The Statute Demonstrate An Intent To Provide A Bank In BNL's Circumstances With A Complete Defense To Payment.

In adopting the specific prohibitions set forth in subparagraphs (A) through (F) of 50 U.S.C. App. § 2407(a)(1), Congress sought to strengthen existing antiboycott policy, which is embodied in § 3(5) of the EAA. *See* Senate Report at 5-6. Section 3(5) provides in pertinent part:

> It is the policy of the United States –
>
> (A) to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States . . . ; [and]
>
> (B) to encourage and, in specified cases, require United States persons engaged in the export of goods or technology or other information to refuse to take actions, including furnishing information or entering into or implementing agreements, which have the effect of furthering or supporting the restrictive trade practices or boycotts fostered or imposed by any foreign country against a country friendly to the United States. . . .

50 U.S.C. App. § 2402(5). In adopting the provisions of the EAA at issue here, Congress was especially motivated by the Arab boycott of Israel.[7] "The 1977 amendments [to the EAA] were specifically aimed at taking a 'stronger stand' on the problem of the Arab boycott of Israel and its

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[7] The House Report states,

> While a number of foreign countries may, from time to time, make political demands on American businesses with regard to business relations with a third country friendly to the United States, the Arab boycott of Israel is the major example of a foreign boycott having sustained and substantial effects on American business.
>
> The Arab countries have conducted an organized economic boycott of Israel since the first days of the Jewish state. The effect of that boycott on U.S. foreign and domestic commerce has increased markedly since the Arab oil embargo and the dramatic increases in Arab oil prices.

H.R. Rep. No. 190, 95th Cong., 1st Sess. 4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 362, 365.

impact on United States business." *Bulk Oil (Zug) A.G. v. Sun Co., Inc.*, 583 F. Supp. 1134, 1140 (S.D.N.Y. 1983), *aff'd*, 742 F.2d 1431 (2d Cir.), *cert. denied*, 469 U.S. 835 (1984); *see also Briggs & Stratton Corp.*, 539 F. Supp. at 1309-1310.

In 1977, Congress prohibited paying, honoring, confirming or otherwise implementing a letter of credit which contains any illegal boycott condition or requirement:

> [T]he President shall issue regulations prohibiting any United States person . . . from taking or knowingly agreeing to take any of the following actions . . . :
>
> * * *
>
> (F) Paying, honoring, confirming, or otherwise implementing a letter of credit which contains any condition or requirement compliance with which is prohibited by regulations issued pursuant to this paragraph, and *no United States person shall, as a result of the application of this paragraph, be obligated to pay or otherwise honor or implement such letter of credit.*

50 U.S.C. App. § 2407(a)(1)(F) (emphasis added).[8] The legislative history demonstrates that Congress intended the EAA amendments to protect a bank in BNL's circumstances from liability for refusing to pay on documentation that contains prohibited boycott terms. The Senate Report states:

> New subparagraph 4A(a)(1)(F) [now codified at 50 U.S.C. App. § 2407(a)(1)(F)] of the bill

---

[8] BNL's Atlanta Agency is a "United States person" within the meaning of the statute and regulations.

> also provides that no U.S. person shall as a result of the application of paragraph 4A(a)(1) [50 U.S.C. App. § 2407(a)(1)] be obligated to pay, or otherwise honor or implement a letter of credit containing an illegal boycott condition. This is intended to insure that the beneficiary of a letter of credit cannot enforce payment of, or secure reformation of, a letter of credit containing such conditions. *The letter may not be paid, and a bank may not be required to pay.*

Senate Report at 42 (emphasis added).

**2. 50 U.S.C. App. § 2407(a)(1)(F) Provides BNL With A Complete Defense To Payment.**

50 U.S.C. App. § 2407(a)(1)(F) provides that "no United States person shall, as a result of the application of [50 U.S.C. App. § 2407(a)(1)], be obligated to pay or otherwise honor or implement such letter of credit," that is, "a letter of credit which contains any condition or requirement compliance with which is prohibited by regulations issued pursuant to *this paragraph*. . . . " 50 U.S.C. App. § 2407(a)(1)(F). The legislative history establishes that the statute is intended to insure that the beneficiary of a letter of credit cannot enforce payment of a letter of credit when some facet of its implementation is prohibited by the antiboycott regulations. *See* Senate Report at 40.

The Antiboycott Office has pronounced that 15 C.F.R. § 769.2(d) prohibits BNL from completing the implementation of the letter of credit by forwarding SMS' documents to Iraq. 15 C.F.R. § 769.2(d) was issued pursuant to "this paragraph" – that is, 50 U.S.C. App. § 2407(a)(1).

BNL's implementation of the letter of credit is thus prohibited by a regulation issued under 50 U.S.C. App. § 2407(a)(1), which is the precise situation earmarked for the absolute defense in § 2407(a)(1)(F). BNL must comply with the regulation and thus has an absolute defense to any obligation to pay under 50 U.S.C. App. § 2407(a)(1)(F).

The Secretary of Commerce also adopted 15 C.F.R. § 769.2(f), which recites numerous letter of credit restrictions, but exempts letters of credit involving foreign beneficiaries like SMS. By contrast, 15 C.F.R. § 769.2(d), the regulation cited by the Antiboycott Office here, does not contain an exemption for foreign beneficiaries. SMS claims that 15 C.F.R. § 769.2(d) should not be construed to apply to letter of credit transactions, and that only § 769.2(f) should be used to regulate letter of credit transactions. If only § 769.2(f) applied, the SMS letter of credit would be exempt since it involves a foreign beneficiary.

The Antiboycott Office has determined, however, that 15 C.F.R. § 769.2(f) is not the only regulation that applies to letter of credit transactions, and that 15 C.F.R. § 769.2(d) separately prohibits in all circumstances (including letter of credit transactions involving foreign beneficiaries) forwarding documentation containing boycott language.

Since 15 C.F.R. § 769.2(d) prohibits BNL from implementing the letters of credit by forwarding SMS' offending documents, 50 U.S.C. § 2407(a)(1)(F) expressly provides BNL with a complete defense to payment. The Secretary of Commerce has indicated its understanding

that the statutory language means that if a bank is precluded by the regulations from implementing a letter of credit, it has an "absolute defense" to payment. *See* 15 C.F.R. § 769.2(f)(5).[9]

### 3. A Bank Is Vested With Statutory Protection In Enforcing And Complying With The Antiboycott Regulations.

United States banks play a central role in the enforcement of the Antiboycott Regulations, and are properly vested with statutory protection in their favor when they comply with the regulations. Boycott language is frequently used in the context of letter of credit transactions, and the regulations thus require that banks refuse in appropriate circumstances to handle anti-Israeli documents as a key component of rendering anti-Israeli language commercially unacceptable in United States commerce. *See, e.g.*, 15 C.F.R. §§ 769.2(d), 769.2(f).

Banks are encouraged to comply with the regulation by virtue of the defense provided in their favor, with the assurance that compliance will not result in financial jeopardy for the bank. In contrast, the decision of the Georgia Court of Appeals places BNL in the precarious position of being required to pay SMS, while being told

---

[9] That section provides in pertinent part:

> Compliance with this section shall provide an absolute defense in any action brought to compel payment of, honoring of, or other implementation of a letter of credit, or for damages resulting from failure to pay or otherwise honor or implement the letter of credit.

15 C.F.R. § 769.2(f)(5).

by the Antiboycott Office that BNL cannot forward SMS' documents to obtain reimbursement. Under the Court of Appeals' theory, BNL should "hazard" the chance of forwarding the documents and risk incurring the wrath and civil and criminal penalties of the Antiboycott Office in the hope that it can establish a pure intent. The EAA, however, does not require BNL to encounter this hazard, and instead, frees BNL from liability when its compliance with the regulations prevents it from completing the implementation of a letter of credit.

If banks were to be placed in risk of financial jeopardy due to compliance with the Antiboycott Regulations, disincentives to compliance would naturally arise. Congress sought to avoid this by vesting banks with a complete defense to any payment obligation when compliance with the regulations precludes completion of a letter of credit transaction. The Court of Appeals' approach directly conflicts with the federal regulatory scheme, and its judgment should be reversed.

## CONCLUSION

Review by this Court presents the only avenue of federal review available to BNL. BNL urges the Court to exercise its certiorari jurisdiction to reinstate the national public policy opposing the Arab boycott against Israel and protecting banks across the country that comply with the Antiboycott Regulations. The petition for certiorari should be granted.

Respectfully submitted,

WALTER W. DRIVER, JR.
RICHARD A. SCHNEIDER
*Counsel of Record*
KING & SPALDING
191 Peachtree Street
Atlanta, Georgia 30303
(404) 572-4600

*Counsel for Petitioner*
*Banca Nazionale del Lavoro*

## APPENDIX
## TABLE OF CONTENTS

Page

Order of the Georgia Supreme Court dated March 18, 1994 ..... 1a

Opinion of the Georgia Court of Appeals dated October 28, 1993 ..... 2a

Order and Judgment of the Superior Court of Fulton County dated December 23, 1992 ..... 8a

Order of the Georgia Court of Appeals dated December 14, 1993 ..... 11a

Order of the Georgia Supreme Court dated April 8, 1994 ..... 12a

Letter from Office of Antiboycott Compliance dated January 18, 1991 ..... 13a

List of Entities Owned 10% or More by BNL..... 15a

**SUPREME COURT OF THE STATE OF GEORGIA**
**CLERK'S OFFICE**
**ATLANTA**

DATE: MARCH 18, 1994

Richard A. Schneider
KING & SPALDING
191 Peachtree St., N.E.
Atlanta GA 303031763

Case No. S94C0491

BANCA NAZIONALE DEL LAVORO v. SMS HASENCLEVER, GMBH

COURT OF APPEALS CASE NO. A93A1467

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Sincerely,

Sherie M. Welch, Clerk

**FIRST DIVISION**
**MCMURRAY, P.J.**
**JOHNSON and BLACKBURN, JJ.**

NOTICE: *MOTIONS FOR RECONSIDERATION MUST BE RECEIVED IN OUR CLERK'S OFFICE WITHIN TEN DAYS OF THE DATE OF DECISION* to be deemed timely filed. (Court of Appeals Rules 4 and 48, March 1, 1985.)

Oct. 28, 1993

In the Court of Appeals of Georgia

A93A1467. BANCA NAZIONALE DEL LAVORO v. SMS HASENCLEVER, GMBH.

McMURRAY, Presiding Judge.

SMS Hasenclever, GmbH of Dusseldorf, Germany, ("SMS") filed an action against Banca Nazionale Del Lavoro ("BNL") for wrongful dishonor of letters of credit issued by the Central Bank of Iraq ("CBI") and confirmed by BNL's promise to honor the letters of credit pursuant to OCGA § 11-5-107(2). BNL admitted endorsing CBI letters of credit and issuing confirmation certificates in favor of SMS, but raised several defenses justifying rejection of payment demands submitted by SMS. BNL filed a motion to dismiss based on SMS's failure to join an indispensable party and the parties filed opposing motions for summary judgment.

SMS is a German corporation that contracted to sell forging machinery and spare parts to an Iraqi enterprise known as Nassr Enterprise for Mechanical Industries ("NEMI"). CBI financed most of the transaction via letters of credit and BNL confirmed the letters of credit by agreeing to be responsible for payment to SMS upon

presentation of documents affirming delivery and acceptance of the goods in Iraq. Specifically, BNL issued confirmation certificates providing for payment of 60 percent of the value of equipment upon presentation of documents proving shipment to Iraq, 10 percent of the value of equipment upon tender of documents proving arrival of goods in Iraq and 10 percent of the value of equipment upon presentation of documents proving NEMI's possession and acceptance of goods.

On July 11, 1990, SMS presented documents confirming two June 20, 1990, shipments to Iraq. The shipping documents satisfied all conditions for payment of 60 percent of the value of the goods shipped, but also included the following certification: " 'We declare that the goods are neither of Israeli origin nor do they contain Israeli materials nor are they beeing [sic] exported from Israel.' " In response, BNL transmitted the following facsimile to SMS: "ON BOTH SETS OF DOCUMENTS BOTH INVOICE AND CERTIFICATE OF ORIGIN SHOW ANTI-ISRAELI BOYCOTT DECLARATION WHICH ARE CONTRARY TO U.S. EXPORT LAWS. THEREFORE DOCUMENTS REMAIN UNPAID AT OUR COUNTERS AT YOUR DISPOSAL PENDING YOUR URGENT INSTRUCTIONS. . . . PLEASE NOTE THAT WE MUST RECEIVE YOUR RESPONSE BY JULY 19, 1990 AFTER THIS DATE WE WILL RETURN DOCUMENTS [FOR] OUR FULL DISCHARGE." SMS then attempted to acquire shipping documents that did not include the anti-Israeli certifications. However, the endeavor floundered because Iraqi officials were unavailable to confirm the replacement documents.

SMS later presented documents confirming arrival of the goods in Iraq. BNL refused these presentations, claiming the 10 percent arrival on-site payments were contingent upon the 60 percent shipping payments.

The trial court denied BNL's motion to dismiss and motion for summary judgment and granted SMS's motion for summary judgment, awarding damages in excess of $17,309,639. This appeal followed. *Held:*

1. In its first and second enumerations, BNL contends the trial court erred in denying its motion for summary judgment and granting summary judgment in favor of SMS.

"A letter of credit transaction basically involves three contracts. The contract of sale between the buyer and seller. A contract between the buyer and a bank under which the bank issues the 'letter of credit' on behalf of its customer – the buyer. The third contract is between the bank and the seller, the beneficiary of the letter of credit – in essence stating, upon presentation of the documentation required by the letter of credit I will honor your draft." *First National Bank of Atlanta v. Wynne,* 149 Ga. App. 811, 814 (1) (256 SE2d 383). "A confirming bank by confirming a credit becomes directly obligated on the credit to the extent of its confirmation as though it were its issuer. . . . " OCGA § 11-5-107(2).

In the case sub judice, it is undisputed that SMS strictly complied with all terms and conditions for payment under the confirmation certificates issued by BNL. See *First National Bank of Atlanta v. Wynne,* 149 Ga. App. 811, 814(1), 815-817, supra. However, BNL argues that it is not obliged to pay because SMS impaired its ability to

collect from CBI by presenting shipping documents with anti-Israeli certifications. Specifically, BNL reasons that any future attempt to seek reimbursement via transmission of the shipping documents to CBI may constitute a violation of 50 USC App. § 2405(5), a federal statute prohibiting letters of credit which contain a condition or requirement for compliance with a boycott of a country friendly to the United States. 15 CFR § 769.2(f)(1).

"One cannot ordinarily utilize advantageously his own fault as an exit or escape from the performance of his contractual obligations." 17A CJS, Contracts, § 459 at p. 601. See *A. M. Kidder & Company, Inc. v. Clement A. Evans & Company, Inc.*, 111 Ga. App. 484, 487(1), 488 (142 SE2d 269). In the case sub judice, any future difficulty BNL may encounter in presenting documents to CBI for reinbursement [sic] because of a violation of 50 USC App. § 2402(5) would necessarily be the result of its own violation of federal antiboycott law. This is not recognition, however, that BNL has violated federal law. It is simply acknowledgment that any such violation with regard to implementing letters of credit which contain conditions or requirements for compliance with a prohibited foreign boycott "applies only with respect to a United States person's activities taken with intent to comply with, further or support an unsanctioned foreign boycott." 15 CFR § 769.2(f)(6).[1] It thus becomes apparent

---

[1] "Intent in this context means the reason or purpose for one's behavior. It does not mean that one has to agree with the boycott in question or desire that it succeed or that it be furthered or supported. But it does mean that the reason why a particular prohibited action was taken must be established." 15 CFR § 769.1(e)(4).

that the presence of shipping documents with anti-Israeli certifications is not the stumbling block for reimbursement from CBI, but is simply circumstantial proof that such a hazard exists. See 15 CFR § 769.1(e)(5). Consequently, BNL's defense that it was not obligated to honor the confirmation certificates because SMS impaired its ability to collect from CBI by presenting shipping documents with anti-Israeli certifications must fall.

2. BNL contends the parties entered into an accord and satisfaction when SMS agreed to submit replacement documents (without anti-Israeli certifications) in exchange for BNL's promise to accept the replacement documents after expiration of time for payment under the confirmation certificates. This assertion is not supported by the record.

The trial court did not err in granting SMS's motion for summary judgment and in denying BNL's motion for summary judgment.

3. In its final enumeration, BNL contends the trial court erred in denying its motion to dismiss based on SMS's failure to join "the United States Office of Anti-boycott Complaince" as an indispensable party. BNL claims that joinder of the federal agency charged with enforcing 50 USC App. § 2402(5) is necessary to determine whether BNL may transmit the shipping documents with anti-Israeli certification to CBI without violating 50 USC App. § 2402(5), thus resolving the validity of BNL's defense that SMS impaired its ability to collect from CBI.

A party is indispensable if full justice cannot be done in the party's absence. OCGA § 9-11-19(a)(1); *Pickett v. Paine*, 230 Ga. 786, 796(4, a) (199 SE2d 223). In Division 1

of this opinion, a determination of any violation of 50 USC App. § 2402(5) was unnecessary to resolve BNL's claim that SMS impaired its ability to gain reimbursement from CBI. Consequently, no reason exists for joining the federal agency charged with enforcing 50 USC App. § 2402(5).

The trial court did not err in denying BNL's motion to dismiss.

Judgment affirmed. Johnson and Blackburn, JJ., concur.

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

| | | |
|---|---|---|
| SMS HASENCLEVER, GMBH,<br><br>Plaintiff,<br><br>v.<br><br>BANCA NAZIONALE DEL LAVORO,<br><br>Defendant. | ) | CIVIL ACTION FILE<br><br>NO. D-90676 |

ORDER AND JUDGMENT

(Filed Dec. 23, 1992)

On March 16, 1992, Defendant Banca Nazionale del Lavoro ("BNL") filed a Motion for Summary Judgment.

On September 21, 1992, Plaintiff SMS Hasenclever, GMBH ("SMS") filed a Motion for Summary Judgment.

On November 2, 1992, BNL filed a Motion to Dismiss Claims Affected By Plaintiff's Failure To Join An Indispensable Party.

After full and complete briefing by the parties on all three of these motions, the Court scheduled a hearing for argument on these three motions for December 22, 1992 at 9:00 a.m. and gave due and proper notice of such hearing to both parties and their counsel.

At the hearing on December 22, 1992, the Court heard argument on the three motions from counsel for SMS and counsel for BNL.

After carefully considering all evidentiary materials of record, along with the briefs and oral argument of both

parties, the Court ORDERS, ADJUDGES, AND DECREES as follows:

a. The SMS Motion for Summary Judgment is granted. Judgment is hereby entered in favor of SMS on Counts I, II, III, and IV of SMS's First Amended Complaint against BNL. SMS shall have and recover from BNL on Count I of the First Amended Complaint the principal sum of $8,278,200.00, plus prejudgment interest on such principal sum through date of judgment in the amount of $1,422,489.40, plus post-judgment interest as provided by law. SMS shall have and recover from BNL on Count II of the First Amended Complaint the principal sum of $4,345,737.00, plus prejudgment interest on such principal sum through date of judgment in the amount of $746,752.32, plus post-judgment interest as provided by law. SMS shall have and recover from BNL on Count III of the First Amended Complaint the principal sum of $812,600.00, plus prejudgment interest on such principal sum through date of judgment in the amount of $120,153.47, plus post-judgment interest as provided by law. SMS shall have and recover from BNL on Count IV of the First Amended Complaint the principal sum of $1,379,700.00, plus prejudgment interest on such principal sum through date of judgment in the amount of $204,006.58, plus post-judgment interest as provided by law. SMS shall also have and recover from BNL its costs of action in the sum of $60.00.

b. BNL's Motion for Summary Judgment is hereby denied.

c. BNL's Motion to Dismiss Claims Affected By Plaintiff's Failure To Join An Indispensable Party is hereby denied.

SO ORDERED, ADJUDGED, AND DECREED THIS 23rd day of December, 1992.

/s/ Don A. Langham
DON A. LANGHAM
Judge, Superior Court
of Fulton County

Presented by:

/s/ Steven M. Collins
Patrick A. Norton
Steven M. Collins
ALSTON & BIRD
One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
(404) 881-7000

**Court of Appeals**

**of the State of Georgia**

**ATLANTA, DECEMBER 14, 1993**

*The Honorable Court of Appeals met pursuant to adjournment.*

*The Following order was passed:*

Case. No. A93A1467

BANCA NAZIONALE DEL LAVORO V. SMS HASEN-CLEVER, GMBH

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

*Court of Appeals of the State of Georgia*
*Clerk's Office, Atlanta*

*Dec. 14, 1993*

*I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.*

*Witness my signature and the seal of said court hereto affixed the day and year last above written.*

/s/ Victoria McLaughlin *Clerk.*

**SUPREME COURT OF GEORGIA**

ATLANTA APRIL 08, 1994

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S94C0491

BANCA NAZIONALE DEL LAVORO V. SMS HASEN-CLEVER, GMBH

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

**SUPREME COURT OF THE STATE OF GEORGIA**

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

Sherie M. Welch, Clerk.

LOGO

**UNITED STATES DEPARTMENT OF COMMERCE**
**Bureau of Export Administration**
Washington, D.C. 20230

January 18, 1991

Mr. John D. Griffin
King & Spalding
2500 Trust Company Tower
Atlanta, Georgia 30303

Dear Mr. Griffin:

This is in response to your letter dated January 11, 1991 concerning SMS Hasenclever; BNL Advices No. 11751 and 11752. As you requested during our telephone conversation today, I am writing to confirm my advice to you.

The beneficiary of the two letters of credit which you faxed to me yesterday is not a United States person, and the underlying transactions are not in United States commerce. Therefore, your letter correctly stated that the prohibition of section 769.2(f) of the Export Administration Act is not applicable to the bank's implementation of the letters of credit.

Nevertheless, the bank's implementation of the letters of credit is in United States commerce, and may violate other prohibitions of the Antiboycott Law. For example, I noted that although the letters of credit requested positive certificates of origin, the benficiary [sic] supplied both affirmative and negative certificates of origin. If the bank transmits the letters of credit without deleting the negative certificates of origin, it will be in violation of

section 769.2(d) of the Export Administration Act, which is the prohibition against furnishing information about business relationships with boycotted countries or black-listed persons.

Sincerely,

/s/ Mary Martin
Mary Martin
Acting Director
Compliance Policy Division

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**Entities Owned 10% or More by BNL**

1. ABECOR – Associated Banks of Europe Corporation S.A. – Bruxelles;
2. Agrifactoring S.p.A. (in liquidation);
3. Apifactor S.p.A.;
4. Artigianfin Holding S.r.l. – Marghera;
5. Banca Nazionale del Lavoro International S.A. – Luxembourg;
6. Banca Nazionale del Lavoro of Canada – Toronto;
7. Banca Nazionale del Lavoro S.A. – Buenos Aires;
8. Banco BNL do Brasil S.A. – San Paolo;
9. BNL Casa Financiera S.A. – Montevideo;
10. BNL EC Ltd. – Sao Paulo;
11. BNL Finance S.p.A. – Rome;
12. BNL Holding Italia – Soc. di Partecipazioni Parabancarie – S.p.A. – Milan;
13. BNL Investment Bank PLC – London;
14. BNL – U.S. Corporation – Delaware;
15. Commercio Factoring S.p.A.;
16. Compagnia di Assicurazione e Riassicurazione S.p.A.;
17. Consicurezza S.p.A. – Roma (in liquidazione);
18. Consorzio Cooperativo per la Centrale Ortofrutticola di Napoli – Societa Cooperativa a r.l. – in liquidazione – Napoli;
19. Cooperleasing S.p.A.;

20. Corit – Concessionaria Riscossione Tributi S.p.A. – Napoli;
21. Credifarma S.p.A;
22. Editoriale Lavoro S.r.l.;
23. Editoriale Lavoro S.r.l. – Roma;
24. Efibanca – Ente Finanziario Interbancario S.p.A. – Roma;
25. Energy Factor S.p.A.;
26. Ente Finanziario Interbancario S.p.A.;
27. Euromedia Garanties – Paris;
28. Factorcoop S.p.A.;
29. Farmafactoring S.p.A.;
30. Federconsorzi Leasing S.p.A. – Roma;
31. Finanziaria Italiana di Partecipazioni S.p.A.;
32. Finanziaria Italiana di Partecipazioni S.p.A. – Roma (Controllata da: Sezione Speciale per il Credito Industriale);
33. Finlombarda Leasing S.p.A.;
34. Firenze Parcheggi S.p.A.;
35. Group Factor S.p.A.;
36. Hesse Newman & Co. (AG. & Co.) – Hamburg;
37. Ifitalia – International Factors Italia S.p.A. – (Milan);
38. Immobiliare Lido di Classe S.p.A. – Ravenna;
39. In Factor S.p.A.;
40. International Factors Italia S.p.A.;

41. Istituto di Credito Piccole Industrie e Artigianato (in liquidation) – Rome;

42. Istituto Ingrosso Innovativo S.p.A. – Milan;

43. Istituto Nazionale Gestione Imposte di Consumo (I.N.G.I.C.) – liquidazione – Roma;

44. Istituto per il Credito Sportivo – Roma;

45. Istituto per L'Edilizia Economica e Popolare di Messina S.p.A. – Messina;

46. Italia Trading Service S.p.A.;

47. Italsiel S.p.A.;

48. Italy (a principal shareholder of Banca Nazionale del Lavoro);

49. ITS – Italia Trading Service S.p.A.;

50. Lavoro Bank A.G. – Zurich;

51. Lavoro Bank Overseas N.V. – Curacao;

52. Lavoro Broker Assicurazioni S.p.A.;

53. Lavoro Commissionaria S.p.A.;

54. Lavoro (Jersey) Ltd. – Jersey;

55. Lazio Lis S.p.A.;

56. Leasing Operativo Italia S.p.A.;

57. Locafit – S.p.A. – Milan;

58. Locafit Deutschland Anlagen Leasing GmbH – Frankfurt;

59. Locafit France S.A. – Paris;

60. Locazione Macchinari Industriali S.p.A.;

61. Lottomatica Societa Consortile per Azioni – Rome;

62. Multiservizi Lavoro SUD S.r.l.;

63. Multiservizi Lavoro SUD S.r.l. – Bari (Controllata da: altre Societa ed Enti del Gruppo BNL);

64. Rank Xerox Noleggi S.p.A.;

65. Riesfactoring S.p.A.;

66. Sarda Factoring S.p.A.;

67. Serfactoring S.p.A.;

68. Servizi Fiduciari Se. Fi. S.p.A. – Milan;

69. S.I.L.C. – Southwest International Leasing Company Ltd. – Chengdu;

70. Sipe Optimation S.p.A.;

71. Societa Azionaria Fiduciaria p.A.;

72. Societa di Intermediazione Mobillare S.p.A.;

73. Societa di Partecipazioni Parabancarie S.p.A. – Milano;

74. Societa di Studi Economici S.p.A.;

75. Societa Fiduciaria e di Servizi per Azioni;

76. Societa Interbancaria Nazionale Gestione p.A.;

77. Societa Interbancaria Nazionale Investimenti;

78. Societa Italiana Leasing Artigiano S.p.A.;

79. Societa Regionale per la Promozione dello Sviluppo Economico dell'Umbria S.p.A. "Sviluppumbria S.p.A." – Perugia;

80. Societe Financiere Europeenne S.F.E. – Luxembourg;

81. Sogecred S.A. – Fribourg;

82. SUD Factoring S.p.A.;

83. SUD Leasing S.p.A.;

84. Tamleasing S.p.A.;

85. T.I.E.C. – The Italian Economic Corporation – New York;

86. Trade Factoring S.p.A.;

87. Veneta Factoring S.p.A.;

88. Verwaltungesellshaft Hesse Newman & Co. AG – Hamburg.

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(2)

Supreme Court, U.S.
FILED
JUL 13 1994
OFFICE OF THE CLERK

No. 93-2006

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1993

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BANCA NAZIONALE DEL LAVORO,

*Petitioner,*

*v.*

SMS HASENCLEVER GMBH,

*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA AND
THE COURT OF APPEALS OF GEORGIA

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## RESPONDENT'S BRIEF IN OPPOSITION

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STEVEN M. COLLINS
*Counsel of Record*
PATRICK [illegible] NORTON
ALSTON & BIRD
One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
(404) 881-7000
*Counsel for Respondent*
July 13, 1994

18 pp

## QUESTIONS PRESENTED

1. Whether Section 8(a)(1)(F) of the Export Administration Act of 1979, 50 U.S.C. App. § 2407(a)(1)(F), applies to a letter of credit when (a) the letter of credit contains no condition or requirement compliance with which is prohibited by regulations issued pursuant to Section 8(a)(1)(F), (b) the transaction to which the letter of credit applies is not in United States commerce, and (c) the beneficiary is not a United States person.

2. Whether a reviewable issue of federal law is presented by a state court ruling that has fully and finally decided as a matter of state law a bank's liability to honor documents presented under a confirmed letter of credit when (a) the only alleged issue of federal law arises in a separate and subsequent transaction between the bank and a third party, and (b) the state court has determined that this federal issue is legally irrelevant to the bank's liability to the beneficiary under state law.

## PARTIES

Petitioner Banca Nazionale del Lavoro ("BNL") is an Italian bank with an agency in Atlanta, Georgia.

Respondent SMS Hasenclever GmbH ("SMS") is a German corporation with its principal place of business in Düsseldorf, Germany. SMS's parent corporation is SMS AG, also a German corporation. SMS has no subsidiaries.

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| QUESTIONS PRESENTED | i |
| PARTIES | ii |
| TABLE OF CONTENTS | iii |
| TABLE OF AUTHORITIES | iv |
| STATUTORY AND REGULATORY PROVISIONS | 1 |
| STATEMENT OF THE CASE | 3 |
| SUMMARY OF THE ARGUMENT | 5 |
| REASONS WHY THE PETITION SHOULD BE DENIED | 7 |
| I. The Letter of Credit Defense in Section 8(a)(1)(F) of the EAA Does Not Apply. | 7 |
| II. The Decision of the Georgia Court of Appeals Rests on State Letter of Credit Law; the Court Decided No Issue of Federal Law. | 8 |
| A. The Georgia Court of Appeals Decision Rests Solely on State Law. | 8 |
| B. A State Court *Dictum* Interpreting a Federal Regulation Does Not Warrant Review by the United States Supreme Court. | 10 |
| III. BNL Remains Free to Challenge through Federal Administrative Procedures and the Federal Courts Federal Regulatory Obstacles, If Any, to BNL's Reimbursement Rights. | 11 |
| CONCLUSION | 13 |

## TABLE OF AUTHORITIES

### Cases


| | PAGE |
|---|---|
| *Centrifugal Casting Mach. Co.* v. *American Bank & Trust Co.*, 966 F.2d 1348 (10th Cir. 1992). . . . . | 5 |
| *Michigan* v. *Long*, 463 U.S. 1032 (1983). . . . | 10 |
| *Voest-Alpine Intern. Corp.* v. *Chase Manhattan Bank*, 707 F.2d 680 (2d Cir. 1983). . . . . | 9 |


### Statutes


| | |
|---|---|
| 28 U.S.C. § 1257. . . . . | 10 |
| *Export Administration Act of 1979*, § 3(5), 50 U.S.C. App. § 2402(5). . . . . | 9 |
| *Export Administration Act of 1979*, § 8(a)(1)(F), 50 U.S.C. App. § 2407(a)(1)(F). . . . . | 1, 6, 7 |
| O.C.G.A. § 11-5-107(2). . . . . | 8 |


### Regulations


| | |
|---|---|
| 15 C.F.R. Part 769 . . . . . | 2, 11 |
| 15 C.F.R. § 769.1(d)(20). . . . . | 2, 11 |
| 15 C.F.R. § 769.2(d). . . . . | 2, 11 |
| 15 C.F.R. § 769.2(f). . . . . | 2, 3-4, 7, 11-12 |


### Other Authorities


| | |
|---|---|
| *Hawkland & Holland UCC Series* § 5-114:01 (Art.5) (1993). . . . . | 9 |
| S. Rep. No. 95-104, 95th Cong., 1st Sess. (1977). . . . . | 12 |

# No. 93-2006

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

BANCA NAZIONALE DEL LAVORO, *Petitioner,*

*v.*

SMS HASENCLEVER GMBH, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA AND THE COURT OF APPEALS OF GEORGIA

## RESPONDENT'S BRIEF IN OPPOSITION

Petitioner BANCA NAZIONALE DEL LAVORO ("BNL") requests the United States Supreme Court to review by writ of certiorari a judgment of the Georgia Court of Appeals. The Supreme Court of Georgia has denied a BNL petition for certiorari presented on essentially identical grounds. Respondent SMS HASENCLEVER GMBH ("SMS") respectfully requests that this Court deny BNL's present petition for the following reasons.

## STATUTORY AND REGULATORY PROVISIONS

Section 8(a)(1)(F) of the Export Administration Act of 1979, as amended (the "EAA"), 50 U.S.C. § 2407(a)(1)(F), provides in relevant part:

> [T]he President shall issue regulations prohibiting any United States person, with respect to his activities in the interstate or foreign commerce of the United States, from taking or knowingly agreeing to take any of the following actions with intent to comply with, further, or support any boycott fostered or imposed by a foreign country against a country which is friendly to the United States and which is not itself the object of

> any form of boycott pursuant to United States law or regulation:
>
> * * *
>
> (F) Paying, honoring, confirming, or otherwise implementing a letter of credit which contains any condition or requirement compliance with which is prohibited by regulations issued pursuant to this paragraph, and no United States person shall, as a result of the application of this paragraph, be obligated to pay or otherwise honor or implement such letter of credit.

U.S. Department of Commerce regulations implementing the antiboycott provisions of the EAA are commonly referred to as the "Antiboycott Regulations." 15 C.F.R. Part 769. The Antiboycott Regulations provide in relevant part:

> § 769.1(d)(20). *See § 769.2(f) on "Letters of Credit" to determine the circumstances in which paying, honoring, confirming, or otherwise implementing a letter of credit is covered by this part.*
>
> § 769.2(f) *Letters of Credit*
>
> (1) No United States person may pay, honor, confirm, or otherwise implement a letter of credit which contains a condition or requirement compliance with which is prohibited by this part, nor shall any United States person, as a result of the application of this section, be obligated to pay, honor or otherwise implement such a letter of credit.
>
> * * *
>
> (6) *This prohibition*, like all others, applies only with respect to a United States person's activities taken with intent to comply with, further, or support an unsanctioned foreign boycott. In addition, it *applies only when the transaction to which the letter of credit applies is in United States commerce and the beneficiary is a United States person.*

(Emphasis added.)

## STATEMENT OF THE CASE

SMS is a German manufacturer. In June 1990, SMS shipped equipment with an invoice price of $21 million from Europe to Iraq. R714, ¶¶ 15-17.[1] The equipment never entered United States commerce. SMS was to be paid for the equipment pursuant to two letters of credit confirmed by BNL's Atlanta agency. R723-34; R1089-92. In July 1990, SMS presented shipping documents to BNL-Atlanta entitling SMS under the letters of credit to payment of 60% of the invoice price of the equipment, or $12.6 million.[2] SMS's documents strictly complied with each of the conditions for payment in the credits. Georgia Court of Appeals' Opinion, Pet. App. 4a.

SMS's documents included certifications that SMS's equipment had not been manufactured in Israel, so-called "negative certifications." R1101, 1104, 1106, 1108. SMS made these certifications only because commercial authorities in Germany had advised SMS that its equipment could not be imported into Iraq without them. R1138-39. Contrary to BNL's Petition (p. 8), SMS's inclusion of negative certifications in its documents was not "gratuitous" or "intended to further the Arab boycott of Israel." The certifications violated no term of the credits and no provision of German law.

Nor did SMS violate U.S. law by including negative certifications in its documents and presenting those documents to BNL. The Antiboycott Regulations exempt letter of credit transactions if either (1) the beneficiary of the credit (SMS) is not a U.S. person, or (2) the goods never entered U.S. commerce. 15

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[1] Citations are to the record page in the Georgia Court of Appeals.

[2] BNL alleges that two subsequent presentations of documents certifying the arrival of SMS's equipment on site in Iraq and entitling SMS to an additional 10% of the price of the equipment are also at issue. Petition, p. 8. In fact, BNL has never pleaded an issue of federal law with regard to SMS's claims for dishonor of those documents. BNL's only defense has been an interpretation of letter of credit law that the Georgia courts have rejected. BNL's liability to SMS for these two dishonors is, accordingly, final as a matter of law and not properly the subject of the present Petition.

C.F.R. § 769.2(f)(6). It is undisputed that both conditions were met here.

BNL has struggled throughout this litigation to find a reading of the Antiboycott Regulations that, despite these exemptions, would permit BNL to dishonor SMS's documents. BNL's theories have varied from court to court and brief to brief. BNL now argues that it is excused from its obligation under state law to honor SMS's documents because the Antiboycott Regulations allegedly prohibit BNL from later using SMS's documents to obtain reimbursement from a third party.

BNL bases this argument on an informal letter, dated January 18, 1990, from a junior Commerce Department official. Pet. App. 13a. The letter confirms that SMS's presentation of documents to BNL for payment is exempt from the Antiboycott Regulations. It also states, however, that after BNL has paid SMS — i.e., *after* consummation of the transactions at issue in this lawsuit — the Antiboycott Regulations will prohibit BNL from using SMS's documents to obtain reimbursement from a third party.

The Regulations themselves contradict this opinion. They provide that where, as here, a letter of credit comes within the exemptions of 15 C.F.R. § 769.2(f)(6), the letter of credit is exempt from *all* antiboycott prohibitions. See, pp. 11-12, *infra*. Despite repeated requests, the Commerce Department has never explained how the January 1990 letter can be reconciled with the terms of the Regulations. R1144-47, 1173-74. Nor has BNL cited any official Commerce Department pronouncement, before or after the January 1990 letter, endorsing the opinion in that letter. Indeed, the interpretation of the Antiboycott Regulations in the letter is so obviously erroneous that BNL filed a special pleading with the trial court putting on record its own disagreement with that interpretation. R1305-07.

BNL's defense in the present litigation thus rests on an informal reading of the Antiboycott Regulations by a junior bureaucrat at the Commerce Department that is: (a) contradicted by the Regulations themselves; (b) not supported by any official Commerce Department pronouncement

or endorsed by any more senior Commerce Department official; and (c) disavowed on the record by BNL. Nevertheless, BNL attempts to invest this reading of the Regulations with the imprimatur of the federal government by repeatedly characterizing it in the Petition as "United States public policy" (p. 13), the "position of the Antiboycott Office" (p. 15), a "federal agency's interpretation of the law" (*id.*), and the like. BNL's reasons for thus continuing to rely on an obvious misreading of a federal regulation are not disclosed in its Petition.

In fact, the real obstacle to BNL's ability to obtain reimbursement if it satisfies the judgment of the Georgia courts and pays SMS is not the Antiboycott Regulations. In August 1990, shortly after BNL's dishonor of SMS's documents, Iraq invaded Kuwait. The Gulf War and ensuing international sanctions have made BNL's reimbursement by the Iraqi bank that issued the original letters of credit highly improbable, with or without SMS's documents. In confirming the letters of credit, BNL specifically undertook the risk that, if a war occurred, it might have to pay SMS without being reimbursed. See, *Centrifugal Casting Mach. Co. v. American Bank & Trust Co.*, 966 F.2d 1348, 1352 (10th Cir. 1992) (BNL, as confirming bank for an Iraqi letter of credit, undertook the risks of "supervening illegality, impossibility, war or insurrection"). BNL has gone to elaborate lengths to concoct a defense under the Antiboycott Regulations only because it wishes to avoid the consequences of the risk it knowingly accepted when it confirmed the letters of credit.

## SUMMARY OF THE ARGUMENT

The decision of the Georgia Court of Appeals conflicts with no decision of any other court, state or federal; it sets no new precedent; and it has no effect on any third party. BNL's Petition should not, therefore, be granted unless the Court of Appeals has decided "an important question of federal law" that should be settled by this Court. See, Rules of the Supreme Court of the United States, Rule 10.1(c).

BNL's Petition presents no such question. It consists primarily of long quotations from the hortatory sections of the EAA and unsupported allegations that grave issues of national importance are at stake. Stripped of the rhetoric, BNL's Petition makes only two legal arguments: (1) that Section 8(a)(1)(F) of the EAA, 50 U.S.C. App. § 2407(a)(1)(F), provides BNL with a statutory defense to its obligation under state law to honor SMS's documents; and (2) that the Georgia Court of Appeals has transgressed the "regulatory scheme" of the EAA by holding BNL obligated under state law to honor documents conforming to a letter of credit when the EAA allegedly prevents BNL from using those documents to obtain reimbursement.

BNL's first argument is wrong; the second is both wrong and irrelevant:

1. The sole conditions for excusing a bank on antiboycott grounds from honoring a letter of credit are set out in Section 8(a)(1)(F) of the EAA. By its terms, that provision does not apply to the transactions at issue here.

2. The Georgia Court of Appeals' ruling that BNL wrongfully dishonored SMS's documents rests entirely on state letter of credit law. No ruling on any question of federal law is necessary to the Court's decision. The Court's only reference to federal law is *dictum*.

3. The transactions at issue here are exempt from all antiboycott prohibitions by the terms of the Antiboycott Regulations and the EAA. If a junior bureacrat's misreading of the law is a genuine obstacle to BNL's reimbursement rights against a third party, BNL remains free to challenge that misreading through federal administrative procedures and in federal courts.

## REASONS WHY THE PETITION SHOULD BE DENIED

### I. The Letter of Credit Defense in Section 8(a)(1)(F) of the EAA Does Not Apply.

In Section 8(a)(1)(F) of the EAA Congress specified the sole conditions under which a bank may be excused on antiboycott grounds from honoring documents presented under a letter of credit. BNL contends that those conditions were satisfied in the present case, and that the Georgia courts erred by failing to recognize this federal statutory defense to SMS's state law claims. Petition, pp. 21-23.

Section 8(a)(1)(F) of the EAA excuses a bank from paying or otherwise honoring "a letter of credit which contains any condition or requirement compliance with which is prohibited by regulations issued pursuant to this paragraph . . ." The letters of credit at issue in this litigation contain no "condition or requirement compliance with which is prohibited by [the Antiboycott Regulations]." BNL admits this. Petition, p.6. On the contrary, the Antiboycott Regulations — the "regulations issued pursuant to this paragraph" — expressly *exempt* these letters of credit from their prohibitions. 15 C.F.R. § 769.2(f)(6). Section 8(a)(1)(F) is therefore inapplicable by its terms.

BNL itself admitted the inapplicability of this statutory defense in its Brief to the Georgia Court of Appeals, where it argued "that the spirit, if not the letter of these absolute defenses, should apply here and shield BNL from any payment liability." Brief of Appellant, p. 21. An alleged inconsistency of a state court ruling with the "spirit" of an inapplicable federal statute is not "an important question of federal law" suitable for review by the United States Supreme Court.

## II. The Decision of the Georgia Court of Appeals Rests on State Letter of Credit Law; the Court Decided No Issue of Federal Law.

Since the statutory provision authorizing banks to dishonor letter of credit documents on antiboycott grounds does not apply, there is no credible basis for arguing that the Georgia Court of Appeals has violated federal antiboycott laws by ordering BNL to honor SMS's documents. BNL nevertheless makes this argument, seizing upon the January 1990 Commerce Department letter to do so. BNL contends that U.S. antiboycott laws bar BNL from using SMS's documents for reimbursement, and that, as a consequence, the Georgia courts' order that BNL honor those documents violates the antiboycott laws. BNL cites no specific provision of the EAA. Instead, it conjoins the inapplicable statutory defense with lengthy quotes from the statute's hortatory sections and legislative history. BNL then concludes grandiloquently that the Court of Appeals' "approach" conflicts with "the federal regulatory scheme." Petition, p. 24. The argument, whatever its other defects, is not relevant to the decision of the Georgia Court of Appeals, which rests entirely on state letter of credit law.

### A. The Georgia Court of Appeals' Decision Rests Solely on State Law.

The premise of the Georgia Court of Appeals' decision is the "independence principle": that a letter of credit transaction involves at least three contracts between (a) the buyer and the seller, (b) the buyer and the bank that issues the credit, and (c) the bank and the seller (the "beneficiary" of the credit), and that each of these contracts is independent of the others. Pet. App. 4a. The only one of the three contracts before the Georgia courts was the letter of credit contract (strictly speaking, two letter of credit contracts) between BNL and SMS. There is no dispute that SMS presented the required documents to BNL, thus fulfilling SMS's obligations under that contract. The Georgia Court of Appeals held that, under the Georgia UCC (O.C.G.A. § 11-5-107(2)) and long-standing Georgia precedents,

BNL was therefore obligated to fulfill its part of the letter of credit contract and honor SMS's documents. *Id.*, 4a-5a.

BNL's antiboycott argument requires a determination that the alleged antiboycott obstacle to its reimbursement from a third party excuses BNL from this direct contractual obligation to SMS. Under the independence principle, however, there is no legal basis for reaching that issue:

> Adverse consequences for the issuer do not alter the issuer's obligation to honor complying payment demands. Thus, even though an issuer may not be able to obtain reimbursement from its customer, the issuer will not be excused from honoring a complying draft or demand for payment.

*Hawkland & Holland UCC Series* § 5-114:01(Art. 5)(1993). *See also, Voest-Alpine Intern. Corp. v. Chase Manhattan Bank*, 707 F.2d 680, 682 (2nd Cir. 1983) (confirming "bank's payment obligation to the beneficiary is primary, direct and completely independent"). Following this axiom of letter of credit law, the Court of Appeals held that a determination of BNL's antiboycott claims was "unnecessary" to its decision. Pet. App. 7a.

The Court of Appeals further observed that:

> any *future* difficulty BNL may encounter in presenting documents to [the Iraqi issuing bank] for reinbursement [sic] because of a violation of 50 USC App. § 2402(5) would necessarily be the result of *its own violation of federal antiboycott law*.

Pet. App. 5a (emphasis added). The reference to "future" difficulty resulting from BNL's "own violation of federal antiboycott law" indicates that the Court of Appeals recognized that any antiboycott issue in BNL's attempt to obtain reimbursement from the Iraqi bank would arise only *after* consummation of the transaction before the Georgia courts. There might, or might not, be such a difficulty, but that was an issue between different parties, arising out of a legally independent relationship, to be resolved by a different tribunal.

In sum, the Georgia courts have ruled that BNL is obligated under state law to pay SMS for BNL's wrongful dishonor of SMS's documents, and that any federal antiboycott obstacle to BNL's reimbursement rights is, as a matter of state law, irrelevant to that obligation. The Court of Appeals has not "decided an important question of federal law" meriting review by this Court. Indeed, since the Court of Appeals' decision rests on an independent and adequate state law ground, BNL's argument does not present a reviewable issue under 28 U.S.C. § 1257(a). See, e.g., *Michigan v. Long*, 463 U.S. 1032, 1041-43 (1983).

### B. A State Court *Dictum* Interpreting a Federal Regulation Does Not Warrant Review by the United States Supreme Court.

The Georgia Court of Appeals acknowledged BNL's argument that the Commerce Department official's letter might pose a problem for BNL if, after paying SMS, BNL sought to obtain reimbursement. The Court observed that, although any antiboycott difficulty "would necessarily be the result of [BNL's] own violation" of the antiboycott laws, "[t]his is not recognition . . . that BNL has violated any law." Pet. App. 5a. The Court then hypothesized that the antiboycott laws might not actually be a barrier because BNL might lack the "intent" required by the Antiboycott Regulations. *Id.* The Court appears to have intended this *dictum* as a favor to BNL. If BNL ever does challenge the Commerce official's reading of the Regulations in a federal court proceeding, the Georgia courts will at least have suggested that BNL has a plausible argument.

In a classic case of biting the hand that feeds you, BNL has seized on this suggestion from the Court of Appeals and tried to turn it into reversible error. Indeed, BNL devotes the most prominent part of its Petition to challenging the Court of Appeals' *dictum* interpreting the Antiboycott Regulations. Petition, pp. 15-18. But whether the Court of Appeals was right in this regard or not is beside the point. The Court's ruling that BNL is liable to SMS does not rest on its speculation as to the impact of the Antiboycott Regulations on a future transaction

but on its application of the plain terms of the Georgia UCC to the transaction before it.

## III. BNL Remains Free to Challenge through Federal Administrative Procedures and the Federal Courts Federal Regulatory Obstacles, If Any, to BNL's Reimbursement Rights.

BNL's Petition is premised on the argument that it is barred by federal antiboycott laws from using SMS's documents to obtain reimbursement, and that grave issues of national policy will be compromised if the Georgia rulings are allowed to stand. BNL also represents that "[r]eview by this Court presents the only avenue of federal review available to BNL." Petition, p. 25. Both BNL's premise and its representation as to available federal remedies are false.

BNL's argument that it is barred from using SMS's documents for reimbursement rests on a single, informal letter from a junior Commerce Department official. See, pp. 4-5, *supra*. The letter acknowledges that under 15 C.F.R. § 769.2(f)(6) SMS's presentation of documents to BNL for payment is exempt from antiboycott letter of credit prohibitions. BNL has seized on the additional statement in the letter that, after paying SMS, BNL will be prohibited from using SMS's documents by 15 C.F.R. § 769.2(d), which prohibits the transmittal of antiboycott information.

Section 769.1(d)(20) of the Antiboycott Regulations explicitly states, however, that § 769.2(f) sets out "the circumstances in which paying, honoring, confirming, or otherwise implementing a letter of credit is covered *by this part*" (emphasis added). "This part" necessarily refers to *Part* 769, i.e., the Antiboycott Regulations as a whole. If, therefore, a letter of credit transaction falls within the exemptions of § 769.2(f)(6), as is the case here, that transaction is exempted from *all* antiboycott prohibitions. This is the only way the Regulations can be read, and neither BNL nor the Commerce Department, despite numerous opportunities, has suggested an alternative reading. (BNL conveniently avoids the issue in its Petition by not informing the Court of § 769.1(d).)

The exemptions in § 769.2(f)(6) of the Regulations for non-U.S. letter of credit transactions are, moreover, taken directly from the legislative history of the EAA. See, U.S. Senate Report No. 95-104, 95th Cong., 1st Sess., at 41 (1977)(statutory prohibitions of EAA governing letters of credit do not apply if "the beneficiary is not a U.S. person or the transaction in question does not involve U.S. commerce . . ."). The opinion in the January 1990 letter that some antiboycott prohibitions apply to letter of credit transactions where "the beneficiary is not a U.S. person" *and* "the transaction in question does not involve U.S. commerce" thus contravenes not only the Antiboycott Regulations but Congress's stated intention in enacting the EAA as well.

The junior bureacrat's opinion that the Antiboycott Regulations prohibit BNL from using SMS's documents to obtain reimbursement thus stands alone, unsupported by statute or regulation, not endorsed by any more senior Commerce Department official, disavowed even by BNL itself. BNL's proper recourse under these circumstances is the same as that of any other party aggrieved by an erroneous bureaucratic decision: dispute the decision in administrative channels; go to federal court if necessary. BNL has not pursued these remedies because it knows that, with or without SMS's documents, it will not obtain reimbursement from Iraq. Rather than accept the consequences of the risk of non-reimbursement that it knowingly assumed by confirming the letters of credit, BNL prefers to try to hide behind a bureaucrat's misreading of the law. Rather than pursue its normal federal remedies, BNL prefers to tell the United States Supreme Court that the remedies do not exist.

## CONCLUSION

The issues of federal law raised in BNL's Petition are either (1) inapplicable, (2) irrelevant, or (3) *dictum*. These are not issues justifying review by the United States Supreme Court. BNL's Petition should be denied.

Respectfully submitted,

STEVEN M. COLLINS
*Counsel of Record*
PATRICK M. NORTON
ALSTON & BIRD
One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
(404) 881-7000
*Counsel for Respondent*
*SMS Hasenclever GmbH*

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JUL 18 1994

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No. 93-2006

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1993

BANCA NAZIONALE DEL LAVORO,
*Petitioner,*
v.
SMS HASENCLEVER GMBH,
*Respondent.*

**On Petition for Writ of Certiorari to the Supreme Court of Georgia and the Court of Appeals of Georgia**

## MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* THE U.S. COUNCIL ON INTERNATIONAL BANKING, INC. AND THE INSTITUTE OF INTERNATIONAL BANKING LAW AND PRACTICE, INC. IN SUPPORT OF PETITIONER

JAMES E. BYRNE
*Counsel of Record*
George Mason University
School of Law
3401 N. Fairfax Drive
Arlington, VA 22201
(301) 977-4035
*Counsel for* Amici Curiae
*The U.S. Council on International Banking, Inc. and the Institute of International Banking Law and Practice, Inc.*

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IN THE

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BANCA NAZIONALE DEL LAVORO,
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**On Petition for Writ of Certiorari to the Supreme Court of Georgia and the Court of Appeals of Georgia**

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## MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

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NOW COMES The U.S. Council on International Banking, Inc. (the "USCIB") and the Institute of International Banking Law and Practice, Inc. ("the Institute"), and, with the consent of petitioner, Banca Nazionale del Lavoro ("BNL"), but without the consent of respondent, SMS Hasenclever GmbH ("SMS") (which has refused consent), respectfully request that this Court grant this motion and receive this amicus brief filed by the USCIB and the Institute, who together respectfully submit that the result in this case is contrary to federal law and to

the practices and expectations of banks in the United States engaged in international letter of credit transactions.

Respectfully submitted,

JAMES E. BYRNE
*Counsel of Record*
George Mason University
School of Law
3401 N. Fairfax Drive
Arlington, VA 22201
(301) 977-4035
*Counsel for* Amici Curiae
***The U.S. Council on International Banking, Inc. and the Institute of International Banking Law and Practice, Inc.***

## TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| INTEREST OF THE AMICI CURIAE | 1 |
| INTRODUCTION | 2 |
| STATEMENT OF THE CASE | 3 |
| REASONS FOR GRANTING THE WRIT | 7 |
| I. UNDER THE ANTIBOYCOTT ENFORCEMENT SCHEME, BANKS ARE CHARGED WITH A PRIMARY ROLE WHICH NECESSITATES PROTECTION | 7 |
| II. IN APPLYING THE ANTIBOYCOTT LAWS, BANKS SHOULD BE ABLE TO RELY ON THE INTERPRETATIONS OF THE OFFICE OF ANTIBOYCOTT COMPLIANCE | 9 |
| CONCLUSION | 10 |

## TABLE OF AUTHORITIES


| Cases | Page |
|---|---|
| *Banca Nazionale del Lavoro v. SMS Hasenclever GmbH*, 211 Ga. App. 360, 439 S.E.2d 502 (1993), *petition for cert. filed*, —— U.S.L.W. —— (U.S. June 16, 1994) (No. 93-2006) | 3, 5 |
| *Chuidian v. Philippine National Bank*, 976 F.2d 561 (9th Cir. 1992) | 5 |
| *Pastor v. National Republic Bank*, 390 N.E.2d 894 (Ill. 1979) | 4 |
| Statutes and Regulations | |
| 50 U.S.C. § 1702 | 7 |
| 50 U.S.C. App. § 2407 | 7, 8, 9 |
| Export Administration Act, 50 U.S.C. App. § 2401 *et seq.* | 2 |
| Export Administration Regulations, 15 C.F.R. Part 769 | 2 |
| 15 C.F.R. § 787.1 | 5 |
| Other Authorities | |
| J. Byrne, *Treatment of Successors to the Beneficiary in Non Transferable Credits: In Support of an Alternate Approach*, in 1994 Annual Survey of Letter of Credit Law and Practice 345 (James E. Byrne & Thomas P. Cavanaugh, eds. 1994) | 4 |
| B. Kozolchyk, *Strict Compliance and the Reasonable Document Checker*, 56 Brooklyn L. Rev. 45 (1990) | 4 |
| *L/C Activity at 300 U.S. Banks: 1st Quarter 1993*, 9 Letter of Credit Update, 30 February 1994 | 1 |
| V. Maulella, *A Banker's View: L/C Participants May Have Differing Interpretations of Transfer and Assignment*, in 1992 Letter of Credit Case Law Survey Handbook 278 (Rodney W. Turner & Thomas P. Cavanaugh, eds. 1993) | 4 |
| U.C.C. § 5-114(2) | 4 |
| Uniform Customs and Practice for Documentary Credits (1983 Revision), I.C.C. Publication No. 400 | 4 |

IN THE

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**On Petition for Writ of Certiorari to the Supreme Court of Georgia and the Court of Appeals of Georgia**

---

## BRIEF OF *AMICI CURIAE* THE U.S. COUNCIL ON INTERNATIONAL BANKING, INC. AND THE INSTITUTE OF INTERNATIONAL BANKING LAW AND PRACTICE, INC. IN SUPPORT OF PETITIONER

---

### INTEREST OF THE *AMICI CURIAE*

The U.S. Council on International Banking, Inc., established in 1924, is a non-profit trade association for banks located in the United States engaged in international banking operations. Its 371 members account for more than 95 per cent of the U.S. $200 billion outstanding in letters of credit and confirmations reported to federal regulators.[1] As indicated in the accompanying Table

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[1] Federally insured banks report outstanding letter of credit obligations quarterly to the Federal Financial Institutions Examination Council. As of December 31, 1993, the amount of outstanding letters of credit was $219,086,000,000.00. For a list of amounts outstanding by the top 300 banks, see *L/C Activity at 300 U.S. Banks: 1st Quarter 1993*, 9 Letter of Credit Update, 30 February 1994.

(Amic. App. 1a-11a), its members are located throughout the United States in every center of international banking. All of its members confirm letters of credit and are regularly affected by antiboycott provisions of the Export Administration Act (50 U.S.C. App. § 2401, *et seq.*) and the regulations promulgated thereunder (15 C.F.R. Part 769, as amended).

The Institute of International Banking Law and Practice, Inc. is a non-profit educational organization engaged in the harmonization and facilitation of letter of credit law and practice. Recently established in late 1992, it sponsors educational activities and has initiated a study directed toward the establishment of an arbitration center for letters of credit. Its membership consists of internationally recognized figures in the field of letter of credit law and practice.

## INTRODUCTION

This case presents the question of whether federal antiboycott law provides a complying bank with an absolute federal defense to any conflicting letter of credit liability under state law. This issue is not particular to the bank involved in the instant case. The members of the USCIB have outstanding billions of dollars in letters of credit and are materially exposed on these credits should a state court be able to impose liability in a situation where the antiboycott statute prevents the confirming bank from forwarding documents. There is and has been a basic understanding by the banking community that compliance with the antiboycott statute as interpreted by the Office of Antiboycott Compliance ("OAC") constitutes an absolute defense to liability under the credit.

If allowed to stand, the state court decision in this case would seriously disrupt international banking operations. In effect, the decision empowers a foreign beneficiary of a letter of credit arbitrarily or deliberately to force upon a U.S. issuer or confirmer of a letter of credit the dilemma of either violating U.S. law by furnishing prohibited information in order to be reimbursed (risking civil and

criminal penalties) or to be liable under letter of credit law without a right to seek reimbursement. Under the rationale of this decision, all the applicant and beneficiary need do is agree between themselves that prohibited information not required by the letter of credit be inserted in a requisite document. No bank could conduct business under this state of affairs and such a result is neither sound nor justified. Moreover, it would have a seriously negative impact on the role of U.S. banks in international banking and the U.S. balance of trade and payments.[2]

## STATEMENT OF THE CASE

The salient elements of this case are:

1. A bank located in the U.S. confirmed, in favor of beneficiary SMS Hasenclever GmbH, a letter of credit calling for various documents, none of which required any information which would violate the antiboycott laws.[3]

2. When the beneficiary later presented documents, the documents contained extraneous statements prohibited by the antiboycott laws.[4]

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[2] Issuance and confirmation of credits is generally undertaken for relatively modest fees, usually calculated in basis points predicated on the face amount of the undertaking. Typically, the fee would be 1/20 of 1 per cent (5 basis points) per quarter or any part thereof for a confirmation of a credit issued by a major international bank. On a million dollar letter of credit, valid for up to three months, the bank would assess only a small fee of approximately $500. As a result, banks are highly risk adverse with respect to letters of credit. Any significant increase in costs would make U.S. bank letters of credit non-competitive with those of other banks around the world.

[3] Brief for Petitioner at 6, *Banca Nazionale del Lavoro v. SMS Hasenclever GmbH*, 211 Ga. App. 360, 439 S.E.2d 502 (1993), *petition for cert. filed*, —— U.S.L.W. —— (U.S. June 16, 1994) (No. 93-2006).

[4] *Id.* at 8. The notion that a document presented to a bank in the U.S. which violates U.S. law can be conforming is erroneous under letter of credit law and practice. When a bank confirms a letter of credit, it undertakes to purchase documents stipulated in the credit, which in combination have an intrinsic value and all of which have significance. If the documents are missing information required by

3. In order to complete the letter of credit transaction, the confirming bank would have to forward the docu-

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the credit (*e.g.*, the name of the vessel on which the goods are laden in a bill of lading), the condition on which the confirmer's undertaking turns is not fulfilled. *See* B. Kozolchyk, *Strict Compliance and the Reasonable Document Checker*, 56 Brooklyn L. Rev. 45 (1990). Many of these expectations of the banking community are articulated in rules of an international character such as the Uniform Customs and Practice for Documentary Credits. The letter of credit in the instant case expressly incorporated the 1983 revision (I.C.C. Publication No. 400) of this internationally accepted standard of letter of credit practice. *See* UCP 400 Article 26(a)(ii) (requiring that, unless otherwise stipulated, a marine bill of lading indicate that "the goods have been loaded on board or shipped on a named vessel . . .").

If a required document contains extraneous data, it may also fail to conform, not fulfilling the condition on which the undertaking is premised. For example, if the packing list states that the goods originated in Country A (not information that would be required to appear on a packing list) but the certificate of origin indicates origin in Country B, the presentation would be rejected. UCP 400 Article 15 provides that "[d]ocuments which appear on their face to be inconsistent with one another will be considered as not appearing on their face to be in accordance with the terms and conditions of the credit."

If the documents are without any value whatsoever due to the fact that they have been forged or are fraudulent, the issuer or confirmer may refuse to honor them since it is implicit in its undertaking that the documents presented will have intrinsic worth. *See* U.C.C. Section 5-114(2), which indicates that an issuer or confirmer which proves forgery or letter of credit fraud may properly dishonor. For situations where courts have found implied letter of credit conditions by operation of law, *see Pastor v. National Republic Bank*, 390 N.E.2d 894 (Ill. 1979); J. Byrne, *Treatment of Successors to the Beneficiary in Non Transferable Credits: In Support of an Alternate Approach*, in 1994 Annual Survey of Letter of Credit Law and Practice 345 (James E. Byrne & Thomas P. Cavanaugh, eds. 1994). For an explanation of transfer in letter of credit practice, see V. Maulella, *A Banker's View: L/C Participants May Have Differing Interpretations of Transfer and Assignment*, in 1992 Letter of Credit Case Law Survey Handbook 278 (Rodney W. Turner & Thomas P. Cavanaugh, eds. 1993).

In a similar sense, it is an implied condition of every letter of credit undertaking subject to U.S. law that the documents pre-

ments to the issuer thereby furnishing prohibited information to a third person.

4. The Office of Antiboycott Compliance advised the parties to this transaction that such conduct by the confirming bank would constitute a violation of the antiboycott laws.[5]

5. The Office of Antiboycott Compliance regularly fines banks $10,000 for each instance in which such prohibited information is furnished by a U.S. bank.[6]

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sented will not violate U.S. law or that acting upon them will not require the bank to violate U.S. law (*e.g.*, purchasing documents related to illegal drugs). *See Chuidian v. Philippine National Bank*, 976 F.2d 561 (9th Cir. 1992) (bank cannot be required to pay on letter of credit where controlling law makes payment illegal). In addition, the doctrines of act of state, comity and public policy may be additional barriers to letter of credit liability. Where the beneficiary of the credit, by its spontaneous action subsequent to the confirmation, creates a condition which renders the documents presented without any intrinsic value to the confirming bank under U.S. law, the confirmer is not liable.

[5] For text of the reply of the OAC, see Brief for Petitioner at 13a, *Banca Nazionale del Lavoro v. SMS Hasenclever GmbH*, 211 Ga. App. 360, 439 S.E.2d 502 (1993), *petition for cert. filed*, —— U.S.L.W. —— (U.S. June 16, 1994) (No. 93-2006). In a letter from Mary Martin, Acting Director, Compliance Policy Division, Office of Antiboycott Compliance, Bureau of Export Administration, to John D. Griffin, dated 1/18/91, Ms. Martin explained that "[i]f the bank transmits the letter of credit without deleting the negative certificates of origin, it will be in violation of section 769.2(d) of the Export Administration Act, which is the prohibition against furnishing information about business relationships with boycotted countries or blacklisted persons."

[6] 15 C.F.R. § 787.1(b)(3), promulgated under the Export Administrative Act in connection with antiboycott regulation, provides: "*Civil penalty.* A civil penalty may be imposed for each violation of the Export Administration Act or any regulation, order or license issued under the Act either in addition to, or instead of, any other liability or penalty which may be imposed. The civil penalty may not exceed $10,000 for each violation except that the civil penalty for each violation involving national security controls imposed under section 5 of the Act may not exceed $100,000. The

6. The confirming bank dishonored and returned the presentation under the letter of credit because, as a result of the OAC opinion, it could not forward the documents in the form they had been presented without violating the antiboycott laws.[7]

7. The beneficiary did not re-present documents with the offending clause removed prior to expiry.[8]

8. The Georgia courts required the confirming bank to pay under state law notwithstanding the federal defense in these circumstances.

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payment of such penalty may be deferred or suspended, in whole or in part, for a period of time that may exceed one year. Deferral or suspension shall not operate as a bar in the collection of the penalty in the event that the conditions of the suspension or deferral are not fulfilled. When any person fails to pay a penalty imposed under this paragraph (b)(3), a civil action for the recovery of the penalty may be brought in the name of the United States, in which action the court shall determine *de novo* all issues necessary to establish liability. Once a penalty has been paid, no action for its refund may be maintained in any court." (Footnote omitted.)

[7] The credit required a "legalized and attested" invoice or certificate of origin. The confirming bank could not itself excise a clause from such a document. The document needed to have been reissued and legalized and attested again.

[8] It is noteworthy that the only party who could have avoided this dilemma is the foreign beneficiary who could have avoided the antiboycott laws by presenting the documents outside the United States in their original form directly to the issuer in Iraq.

## REASONS FOR GRANTING THE WRIT

Given these factors, the Petitioner/confirming bank should be excused from liability under state law because the Export Administration Act provides a bank with an absolute defense from liability arising from compliance with its requirements.

Petitioner's brief recounts the legislative history of the Act and marshals arguments as to why the absolute defense under it should be available to banks for any prohibited action with respect to a letter of credit.[9] To these arguments, Amici add the following points:

### I. UNDER THE ANTIBOYCOTT ENFORCEMENT SCHEME, BANKS ARE CHARGED WITH A PRIMARY ROLE WHICH NECESSITATES PROTECTION.

The U.S. government regularly uses the U.S. banking system as a means of implementing its foreign policy. In a wide range of areas from national security to drug money laundering, the banks are required to withhold payments, freeze funds, or report information.[10] Consistent

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[9] The Export Administration Act ("the EAA"), 50 U.S.C. App. § 2407(a)(1)(F) provides:

> (F) Paying, honoring, confirming, or otherwise implementing a letter of credit which contains any condition or requirement compliance with which is prohibited by regulations issued pursuant to this paragraph, and no United States person shall, as a result of the application of this paragraph, be obligated to pay or otherwise honor or implement such letter of credit.

[10] As another example of a federal statute that provides a defense to liability when there is compliance with federal law, see International Emergency Economic Powers Act, 50 U.S.C. § 1702(a)(3), which provides that a person acting in good faith under the provisions of the Act will be held harmless from any liability:

> (3) Compliance with any regulation, instruction, or direction issued under this title [50 U.S.C. § 1701, *et seq.*] shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same. No person shall be held liable in any court for or with respect

with this approach, the antiboycott laws effectively force upon banks the role of front line enforcement. Since the bulk of affected international trade is channelled through the banking system, this is a particularly efficient method. For this reason, the OAC has actively interested itself in bank compliance programs, has carefully monitored bank performance, and has strictly levied fines against banks for technical violations. In effect, the statutory scheme makes banks the *de facto* agents of the federal government for purposes of monitoring the transactions which fall within their purview. As a result, every bank dealing extensively in international letters of credit has been forced to establish elaborate procedures, hire personnel, train them and audit the program to assure compliance. OAC also regularly audits banks for compliance with its regulations.

It is precisely because of this primary role that 50 U.S.C. App. § 2407(a)(1)(F) has accorded banks which have complied with the statute a "safe harbor". Absent such a provision, banks would face a threat of double liability under state and federal law.

The effect of the absolute defense in the antiboycott statute is to relieve banks which comply with the statute from the threat of liabilty under state letter of credit law. Otherwise, banks would be placed in the impossible position of having to choose between violating federal law or incurring liability under state law. Such a dilemma would make the regular conduct of this business impossible. It is this dilemma, produced by the state court decision, which is so worrisome.

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to anything done or omitted in good faith in connection with the administration of, or pursuant to and in reliance on, this title, or any regulation, instruction, or direction issued under this title.

## II. IN APPLYING THE ANTIBOYCOTT LAWS, BANKS SHOULD BE ABLE TO RELY ON THE INTERPRETATIONS OF THE OFFICE OF ANTIBOYCOTT COMPLIANCE.

It is one thing to provide an absolute defense when a bank complies with the antiboycott laws. It is quite another matter—and perhaps more important—how and by whom compliance is measured. While banks are able to serve as "enforcers" of the antiboycott laws, it was never the intention of the statute or regulations and it is completely inconsistent with safe and sound banking practice for them to be "interpreters." The dynamic of the antiboycott compliance program is to encourage the neutral middleperson to implement it without necessitating an extensive and expensive federal infrastructure. In furtherance of this program, banks regularly request and receive specific interpretations from the OAC addressing actual situations.[11] Where the banks have fairly stated the issues and carry out these interpretations, they should be able to assert the absolute defense of 50 U.S.C. App. § 2407(a)(1)(F).

The rationale underlying the exemption is that banks should not be caught in the middle and forced to take the risk of guessing how the rules will ultimately be interpreted or construed. For the banking system to continue to function in this role, it is essential that there be a safe harbor upon which a bank can rely. Until the decision in the instant case, banks have assumed that they could rely on the opinions expressed by the OAC to shield them from double liability. Indeed, any other system is unworkable and would force banks to withdraw from this business.

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[11] In the instant case, Petitioner requested and received such an opinion, as did Respondent. Pet. App. 13a-14a; Respondent's Brief, p. 4.

## CONCLUSION

To now permit the beneficiary to recover from the confirming bank when the beneficiary's conduct forced the confirming bank into an impossible dilemma is bizarre. The result of the state court decision would be to encourage beneficiaries and applicants to hide their intentions to later provide antiboycott declarations from the issuers and confirmers and to thereafter insert the prohibited statements in required documents. Faced with the possibility of such situations and the loss of a right of reimbursement, the U.S. international banking operations community would have no choice but to cease making such undertakings.

Because of the substantially adverse impact upon international banking operations, the Amici urge the Court to grant Petitioner a Writ of Certiorari.

Respectfully submitted,

JAMES E. BYRNE
*Counsel of Record*
George Mason University
School of Law
3401 N. Fairfax Drive
Arlington, VA 22201
(301) 977-4035
*Counsel for* Amici Curiae
*The U.S. Council on International Banking, Inc. and the Institute of International Banking Law and Practice, Inc.*

# APPENDIX

## USCIB MEMBER INDEX BY STATE

### ALABAMA

| Member | City |
|---|---|
| Amsouth Bank, N.A. | Birmingham |
| Compass Bank | Birmingham |
| First Alabama Bank | Birmingham |
| SouthTrust Bank of Alabama, N.A. | Birmingham |

### ARIZONA

| | |
|---|---|
| Bank of America Arizona | Phoenix |
| Bank One, Arizona, N.A. | Phoenix |

### CALIFORNIA

| | |
|---|---|
| Community Bank | City of Industry |
| Bank of America | Concord |
| Republic Bank California N.A. | Encino |
| National Bank of Long Beach | Long Beach |
| ABN Amro Bank, N.V. | Los Angeles |
| American Express Bank Int'l | Los Angeles |
| Asahl Bank, Ltd., The | Los Angeles |
| Bancomer, S.A. | Los Angeles |
| Int'l Banking Branch | Los Angeles |
| City National Bank | Los Angeles |
| Credit Suluse | Los Angeles |
| Dal-ichi Kangyo Bank of California | Los Angeles |
| Eastern International Bank | Los Angeles |
| Far East National Bank | Los Angeles |
| Fuji Bank Ltd. | Los Angeles |
| LIPPOBANK | Los Angeles |
| Manufacturers Bank | Los Angeles |
| Mitsubishi Bank Ltd., The | Los Angeles |
| Mitsubishi Trust & Banking Corporation | Los Angeles |
| P.T. Bank Dagang Nasional Indonesia | Los Angeles |
| Philadelphia International Bank | Los Angeles |
| Sanwa Bank California | Los Angeles |
| Standard Chartered Bank | Los Angeles |
| State Street Bank International | Los Angeles |
| Union Bank | Monterey Park |
| Imperial Bank | Redondo Beach |
| San Diego Trust & Savings Bank | San Diego |

| Member | City |
|---|---|
| ABN Amro Bank, N.V. | San Francisco |
| Bank of California | San Francisco |
| Banque Nationale De Paris | San Francisco |
| Liu Chong Hing Bank Limited | San Francisco |
| Wells Fargo Bank | San Francisco |
| Silicon Valley Bank | Santa Clara |
| Metrobank | Torrance |
| **COLORADO** | |
| CoBank—National Bank for Cooperatives | Denver |
| Colorado National Bank | Denver |
| First Interstate Bank of Denver | Denver |
| **CONNECTICUT** | |
| Shawmut Bank | Hartford |
| Centerbank | New Haven |
| Union Trust Company | Stamford |
| **DISTRICT OF COLUMBIA** | |
| Abu Dhabi International Bank Inc. | Washington |
| Riggs National Bank | Washington |
| U.S. Department of the Treasury | Washington |
| **FLORIDA** | |
| ABN Amro Bank, N.V. | Miami |
| American Express Bank Int'l Miami Branch | Miami |
| Amtrade International Bank of Florida | Miami |
| Banco Latino International | Miami |
| Banco Popular del Ecuador, S.A.—Miami Agency | Miami |
| Banque Sudameris | Miami |
| Barnett Bank | Miami |
| Credit Suisse | Miami |
| First Union National Bank of Florida | Miami |
| Hamilton Bank, N.A. | Miami |
| IBJ Schroder International Bank | Miami |
| Jamaica Citizens Bank Ltd | Miami |
| Lloyds Bank Plc Miami | Miami |
| NationsBank International Miami | Miami |
| Northern Trust Bank of Florida, N.A. | Miami |
| Popular Bank of Florida | Miami |
| SunBank, N.A. | Orlando |
| Salomon Forex Inc. | Tampa |

| Member | City |
|---|---|
| **GEORGIA** | |
| ABN Amro Bank, N.V. | Atlanta |
| Bank South, N.A. | Atlanta |
| NationsBank of Georgia N.A. | Atlanta |
| Standard Chartered Bank | Atlanta |
| Summit National Bank, The | Atlanta |
| Trust Company Bank | Atlanta |
| **HAWAII** | |
| Bank of Hawaii | Honolulu |
| First Hawaiian Bank | Honolulu |
| **IOWA** | |
| Brenton Bank & Trust Company—Cedar Rapids | Cedar Rapids |
| Firstar Bank Cedar Rapids, N.A. | Cedar Rapids |
| Bankers Trust Company | Des Moines |
| **ILLINOIS** | |
| ABN Amro Bank (Chicago Branch) | Chicago |
| American National Bank & Trust of Chicago | Chicago |
| BankAmerica International | Chicago |
| Caisse Nationale de Credit Agricole | Chicago |
| Chicago-Tokyo Bank, The | Chicago |
| Continental Bank N.A. | Chicago |
| First National Bank of Chicago | Chicago |
| Harris Trust & Savings Bank | Chicago |
| La Salle National Bank | Chicago |
| Northern Trust Bank, The | Chicago |
| Union Bank of Switzerland | Chicago |
| NBD Bank | Elk Grove Village |
| Cole Taylor Bank | Skokie |
| **INDIANA** | |
| Fort Wayne National Bank | Fort Wayne |
| Bank One, Indianapolis, N.A. | Indianapolis |
| NBD Bank, N.A. | Indianapolis |
| **KANSAS** | |
| U.S. Central Credit Union | Overland Park |
| **KENTUCKY** | |
| Liberty National Bank & Trust Company | Louisville |

| Member | City |
|---|---|
| **LOUISIANA** | |
| Alerion Bank | New Orleans |
| Hibernia National Bank | New Orleans |
| **MASSACHUSETTS** | |
| ABN Amro Bank, N.V. | Boston |
| Bank of Boston | Boston |
| Fleet Bank of Massachusetts | Boston |
| Shawmut Bank N.A. | Boston |
| State Street Bank & Trust Company | Boston |
| Boston Safe Deposit & Trust Company | Medford |
| Bay Bank Boston, N.A. | Waltham |
| **MARYLAND** | |
| First National Bank of Maryland | Baltimore |
| Maryland National Bank | Baltimore |
| Signet Bank | Baltimore |
| Darian Consulting Group, Inc. | Chestertown |
| **MICHIGAN** | |
| Comerica Bank | Detroit |
| First of America Bank | Detroit |
| Michigan National Bank | Detroit |
| NBD Bank, N.A. | Detroit |
| Old Kent Bank And Trust Company | Grand Rapids |
| **MINNESOTA** | |
| First Bank System | Minneapolis |
| National City Bank of Minneapolis | Minneapolis |
| Norwest Bank Minnesota N.A. | Minneapolis |
| **MISSOURI** | |
| Commerce Bank of Kansas City N.A. | Kansas City |
| Mercantile Bank of St. Louis N.A. | St. Louis |
| Boatmen's National Bank of St. Louis | St. Louis |
| **MISSISSIPPI** | |
| Deposit Guaranty National Bank | Jackson |
| **NORTH CAROLINA** | |
| First Union Nat'l Bank of North Carolina | Charlotte |
| NationsBank of North Carolina, N.A. | Charlotte |

| Member | City |
|---|---|
| Southern National Bank | Charlotte |
| First Citizens Bank | Raleigh |
| Wachovia Bank | Winston-Salem |
| **NEBRASKA** | |
| National Bank of Commerce Trust & Savings Assoc. | Lincoln |
| First National Bank of Omaha | Omaha |
| **NEW JERSEY** | |
| Morgan Laboratories, Inc. | Cliffside Park |
| United Jersey Bank | Hackensack |
| Bank of Tokyo Ltd. | Jersey City |
| McDonnell Douglas Information Systems, Inc. | Lyndhurst |
| First Fidelity Bank N.A., New Jersey | Newark |
| Painewebber, Incorporated | Washawken |
| National State Bank, The | Woodbridge |
| **NEW YORK** | |
| Key Bank of New York N.A. | Albany |
| Chase Manhattan Bank N.A. | Brooklyn |
| Royal Bank of Canada | Brooklyn |
| ABN Amro Bank, N.V. | New York |
| Allied Irish Bank | New York |
| American Express Bank Ltd. | New York |
| American Management Systems, Inc. | New York |
| American Scandinavian Banking Corp. | New York |
| Arab American Bank | New York |
| Arab Bank PLC | New York |
| Arab Banking Corporation | New York |
| Atlantic Bank of New York | New York |
| Australia & New Zealand Banking Group Ltd. | New York |
| Banca Commerciale Italiana | New York |
| Banca Di Roma | New York |
| Banca Nazionale Del Lavoro | New York |
| Banca Nazionale dell'Agricoltura | New York |
| Banca Sertin, S.A. | New York |
| Banco Atlantico | New York |
| Banco Bamerindus do Brasil | New York |
| Banco Bilbao Vizcaya S.A. | New York |
| Banco Bradesco S.A. | New York |
| Banco Central Hipanoamericano S.A. | New York |
| Banco De Credito Del Peru | New York |

| Member | City |
|---|---|
| Banco De La Nacion Argentina | New York |
| Banco De La Provincia De Buenos Aires | New York |
| Banco De La Republica Oriental Del Uruguay | New York |
| Banco Di Napoli | New York |
| Banco Di Sicilia Spa | New York |
| Banco Do Brasil, S.A. | New York |
| Banco do Estado de Sao Paulo S.A. | New York |
| Banco Industrial De Venezuela NY Agency | New York |
| Banco International, S.A. | New York |
| Banco Nacional de Mexico S.A. | New York |
| Banco Nacional S.A. | New York |
| Banco Portugues Do Atlantico | New York |
| Banco Real S.A. | New York |
| Banco Santander, New York Branch | New York |
| Bancomer, S.A. | New York |
| Banesto Banking Corporation | New York |
| Bangkok Bank Public Company Ltd., New York | New York |
| Bangkok Metropolitan Bank, Ltd. | New York |
| Bank Audi (USA) | New York |
| Bank Austria Aktiengesellschaft | New York |
| Bank Brussels Lambert | New York |
| Bank Bumi Daya, New York Agency | New York |
| Bank Hapoalim B.M. | New York |
| Bank Julius Baer & Co. Ltd. | New York |
| Bank Leumi Trust Company | New York |
| Bank of Bermuda Ltd. N.Y. | New York |
| Bank of California International, The | New York |
| Bank of China, New York Branch | New York |
| Bank of East Asia, Ltd., The | New York |
| Bank of Hawaii International Corporation | New York |
| Bank of Ireland | New York |
| Bank of Montreal | New York |
| Bank of New York | New York |
| Bank of Nova Scotia | New York |
| Bank of Yokohama, Ltd., The | New York |
| Bank Polska Kasa Opieki | New York |
| Bank Rakyat Indonesia | New York |
| Bank Saderat Iran | New York |
| BankAmerica International | New York |
| Bankers Trust Company | New York |
| Banque Francaine Du Commerce Exterieur | New York |
| Banque Indosuez | New York |
| Banque Nationale De Paris | New York |
| Banque Paribas | New York |
| Banque Worms Capital Corp. | New York |

| Member | City |
|---|---|
| Barclays Bank PLC | New York |
| Bayerische Hypotheken-Und Wechsel-Bank | New York |
| Bayerische Landesbank Girozentrale | New York |
| Bayerische Vereinsbank A.G. | New York |
| Berliner Handels-Und Frankfurter Bank | New York |
| Brown Brothers Harriman & Company | New York |
| BSI-Banca della Svizzera Italiana | New York |
| Caisse Nationale de Credit Agricole | New York |
| Canadian Imperial Bank of Commerce | New York |
| Cariplo Spa | New York |
| Chemical Bank | New York |
| Chiba Bank, Ltd. | New York |
| Cho Hung Bank | New York |
| Christiania Bank | New York |
| Citibank N.A. | New York |
| Commercial Bank of Kuwait | New York |
| Commercial Bank of New York | New York |
| Commerzbank A.G. New York Branch | New York |
| Commonwealth Bank of Australia | New York |
| Compagnie Financiere de CIC et de l'Union European | New York |
| Continental Bank International | New York |
| Credit Commercial De France | New York |
| Credit Lyonnais | New York |
| Credit Suisse | New York |
| Creditanstalt-Bankverein | New York |
| Credito Italiano | New York |
| Dai-ichi Kangyo Bank, Ltd., The | New York |
| Dalwa Bank Trust Company | New York |
| DBS Bank | New York |
| Den Danske Bank | New York |
| Deutsche Bank AG | New York |
| DG Bank (Deutsche Genossenschaftsbank) | New York |
| Dresdner Bank A.G. | New York |
| Extebank | New York |
| Federal Reserve Bank of New York | New York |
| First Bank of the Americas | New York |
| First Chicago International, New York Branch | New York |
| Fuji Bank Ltd. | New York |
| Generale Bank | New York |
| Girocredit Bank | New York |
| Goldman Sachs Trust Company | New York |
| Gulf International Bank, New York | New York |
| Harris Bank International Corp. New York | New York |
| Hongkong & Shanghai Banking Corp. Ltd., The | New York |

| Member | City |
|---|---|
| IBJ Schroder Bank & Trust Company | New York |
| Industrial Bank of Japan, Ltd. | New York |
| ING (US) Capital Holdings Corp. | New York |
| International Commercial Bank of China, The | New York |
| International Finance Banking Corporation | New York |
| Israel Discount Bank of New York | New York |
| Istituto Bancario San Paolo Di Torino Spa | New York |
| Kansallis-Osaka-Pankki (New York Branch) | New York |
| Kapiti, Inc. | New York |
| Korea Exchange Bank, New York Branch | New York |
| Kredietbank | New York |
| Landesbank Hessen-Thueringen | New York |
| LBS Bank-New York | New York |
| Lehman Brothers | New York |
| Lloyds Bank Plc | New York |
| Long-Term Credit Bank of Japan, Ltd. | New York |
| Manufacturers And Traders Trust Company | New York |
| Marine Midland Bank, N.A. | New York |
| MeesPierson | New York |
| Merchants Bank of New York, The | New York |
| Merrill Lynch International Bank | New York |
| Midland Bank Plc | New York |
| Mitsubishi Bank Ltd., The | New York |
| Mitsubishi Trust & Banking Corporation | New York |
| Mitsui Trust & Banking Company, Ltd. | New York |
| Monte del Paschi di Siena | New York |
| Morgan Guaranty Trust Company of N.Y. | New York |
| MTB Bank | New York |
| Multibanco Comermex S.A. | New York |
| National Australia Bank Ltd. | New York |
| National Bank of Canada | New York |
| National Bank of Kuwait | New York |
| National Westminster Bank PLC | New York |
| National Westminster Bank USA | New York |
| NationsBank International | New York |
| Nippon Credit Bank, Ltd | New York |
| Norddeutsche Landesbank Girozentrale | New York |
| Norinchukin Bank | New York |
| Northern Trust Int'l Banking Corp., The | New York |
| Norwest Bank International | New York |
| Park Avenue Bank, N.A., The | New York |
| Philadelphia International Bank | New York |
| PNC Bank International, New York | New York |
| Postipankki Ltd. | New York |

| Member | City |
|---|---|
| PT. Bank Dagang Negara (Persero) NY Agency | New York |
| Rabobank Nederland | New York |
| Republic National Bank of New York | New York |
| Royal Bank of Scotland Plc | New York |
| Sakura Bank Limited | New York |
| Sanwa Bank Ltd. New York | New York |
| Saudi International Bank | New York |
| Siam Commercial Bank, Ltd. | New York |
| Skandinaviska Enskilda Banken | New York |
| Societe Generale | New York |
| Standard Chartered Bank Ltd. | New York |
| State Bank of India | New York |
| State Street Bank International | New York |
| Sterling National Bank & Trust Company | New York |
| Sumitomo Bank Ltd., The | New York |
| Sumitomo Trust & Banking Co., Ltd. | New York |
| Svenska Handelsbanken | New York |
| Swedbank | New York |
| Swiss Bank Corporation | New York |
| Thai Farmers Bank Public Co., Ltd. | New York |
| Tokai Bank Ltd. | New York |
| Toronto-Dominion Bank, The | New York |
| Unibanco-Uniao De Bancos Brasileiros Sa | New York |
| Unibank A/S | New York |
| Union Bank of Finland Ltd. | New York |
| Union Bank of Switzerland | New York |
| United Bank of Kuwait Plc., The | New York |
| United Overseas Bank, Ltd. | New York |
| Westdeutsche Landesbank | New York |
| Westpac Banking Corporation | New York |
| Yasuda Trust & Banking Co., Ltd., The | New York |
| Nordbanken New York Branch | Rye |
| European American Bank | Uniondale |

OHIO

| | |
|---|---|
| Fifth Third Bank, The | Cincinnati |
| Provident Bank, The | Cincinnati |
| Star Bank, N.A. | Cincinnati |
| National City Bank, Cleveland | Cleveland |
| Society National Bank | Cleveland |
| Bank One, Columbus, N.A. | Columbus |
| Huntington National Bank, The | Columbus |

| Member | City |
|---|---|
| **OKLAHOMA** | |
| Liberty Bank & Trust Co. of Oklahoma City, N.A. | Oklahoma City |
| Bank of Oklahoma, N.A. | Tulsa |
| Liberty Bank & Trust Company of Tulsa, N.A. | Tulsa |
| **OREGON** | |
| First Interstate Bank of Oregon, N.A. | Portland |
| U.S. National Bank of Oregon | Portland |
| **PENNSYLVANIA** | |
| CoreStates Bank N.A. | Philadelphia |
| Meridian Bank | Philadelphia |
| ABN Amro Bank, N.V. Pittsburgh Branch | Pittsburgh |
| Integra Bank | Pittsburgh |
| Mellon Bank | Pittsburgh |
| PNC Bank, National Association | Pittsburgh |
| **RHODE ISLAND** | |
| Old Stone Bank, A Federal Savings Bank | Providence |
| **TENNESSEE** | |
| First Tennessee Bank, N.A. | Memphis |
| National Bank of Commerce | Memphis |
| First American National Bank | Nashville |
| **TEXAS** | |
| Bank One, Texas, N.A. | Dallas |
| NationsBank Texas, N.A. | Dallas |
| State National Bank | El Paso |
| Sunwest Bank | El Paso |
| Bank One, Texas, N.A. | Forth Worth |
| ABN Amro Bank, N.V. Houston Agency | Houston |
| Bank One, Texas, NA | Houston |
| Texas Commerce Bank | Houston |
| International Bank of Commerce | Laredo |
| Frost National Bank | San Antonio |
| **UTAH** | |
| First Security Bank of Utah N.A. | Salt Lake City |

| Member | City |
|---|---|
| **VIRGINIA** | |
| Central Fidelity National Bank | Richmond |
| Crestar Bank | Richmond |
| **WASHINGTON** | |
| ABN Amro Bank, N.V. | Seattle |
| Christiania Bank | Seattle |
| First Interstate Bank of Washington, N.A. | Seattle |
| Seattle First National Bank | Seattle |
| U.S. Bank of Washington, N.A. | Seattle |
| West One Bank | Seattle |
| Key Bank of Washington | Tacoma |
| North Pacific Bank | Tacoma |
| **WISCONSIN** | |
| Bank One, Milwaukee, N.A. | Milwaukee |
| Firstar Bank—Milwaukee | Milwaukee |
| M&I Marshall & Ilsley Bank | Milwaukee |

(4)

No. 93-2006

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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1993

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BANCA NAZIONALE DEL LAVORO,
*Petitioner,*

v.

SMS HASENCLEVER GMBH,
*Respondent.*

---

**On Petition for Writ of Certiorari to the Supreme Court of Georgia and the Court of Appeals of Georgia**

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## REPLY BRIEF FOR THE PETITIONER

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WALTER W. DRIVER, JR.
RICHARD A. SCHNEIDER
*Counsel of Record*
PAUL J. LARKIN, JR.
JAMES W. BOSWELL
KING & SPALDING
191 Peachtree Street
Atlanta, Georgia 30303-1763
(404) 572-4600
*Counsel for Petitioner*

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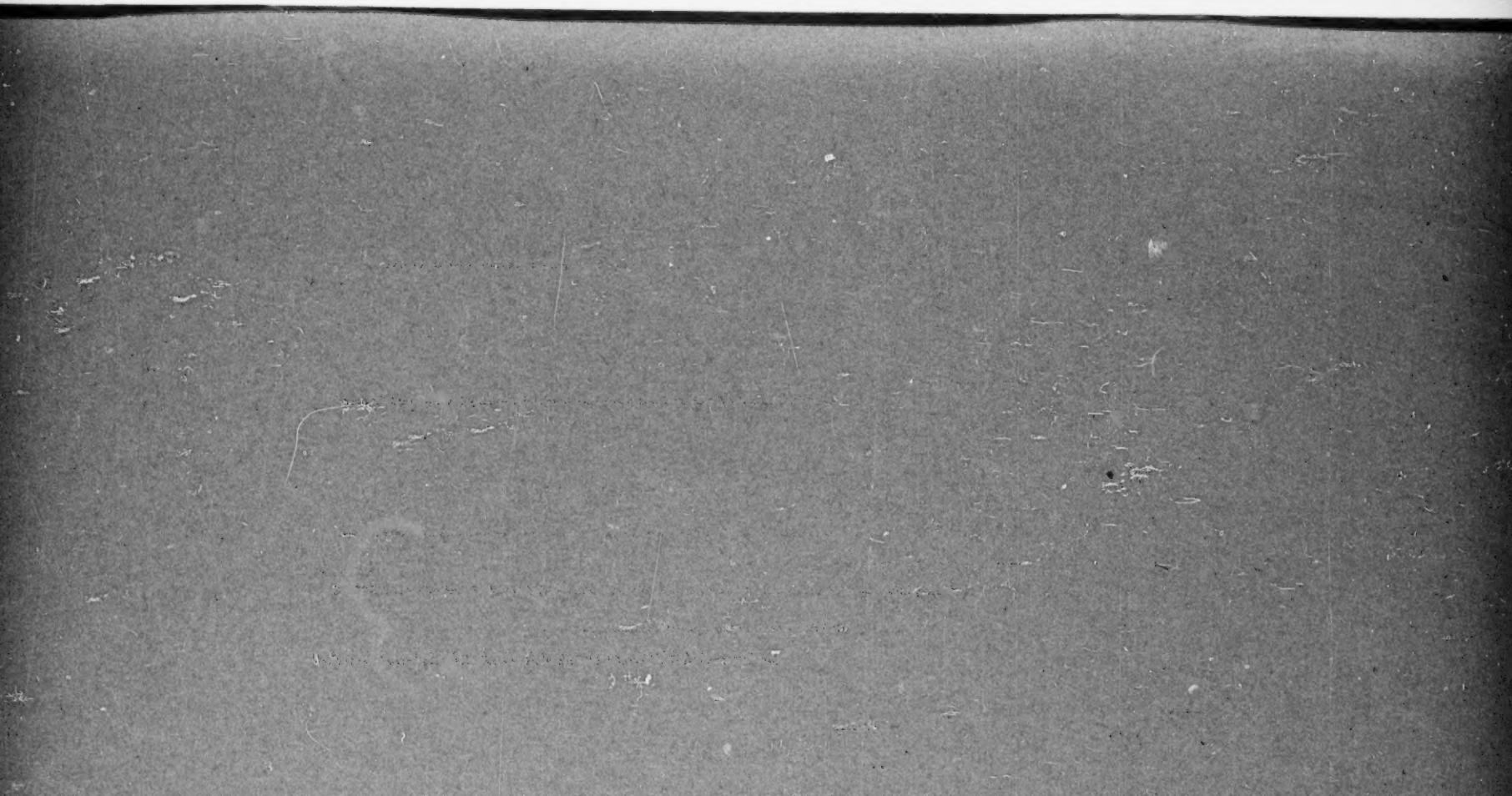

## TABLE OF AUTHORITIES


CASES — Page

*Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) ..... 3

*Stinson v. United States*, 113 S. Ct. 1913 (1993) ..... 3-4

STATUTES AND REGULATIONS

50 U.S.C. App. § 2407 ..... 1, 2, 6

15 C.F.R. § 769.1 ..... 4

15 C.F.R. § 769.2 ..... 2, 3, 4

OTHER AUTHORITIES

Howard N. Fenton, III, *Compliance Comments, Exempting Banks for Forwarding LC Documents May be Good Policy, But It's Not the Law; A Response to John Ellicott*, Boycott Law Bulletin (Nov. 1985) ..... 4

Howard N. Fenton, III, *Compliance Comments, Letter of Credit Handling Versus Bank's Other Activities; Banks May Yet Face Double Charges for Single LC Transactions*, Boycott Law Bulletin (June 1985) ..... 4

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# Supreme Court of the United States

OCTOBER TERM, 1993

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## REPLY BRIEF FOR THE PETITIONER

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1. Respondent claims that the Georgia Court of Appeals' decision rests entirely on state law grounds. Br. in Opp. 8-10. That claim is meritless. In this case, petitioner has asserted that it has an absolute defense under federal law to liability under state letter of credit law. The assertion of this federal defense clearly raises a federal issue as to the effect of 50 U.S.C. App. § 2407(a)(1)(F) and the Antiboycott Regulations. Moreover, the Georgia Court of Appeals expressly passed on the federal defense even though it misapplied the Antiboycott Regulations in its opinion. *See* Pet. App. 4a-6a. The Court of Appeals did not—nor could it under the Supremacy Clause—reject petitioner's federal defense on the merits by applying state law. Simply put, petitioner

asserted a federal defense to liability, and the law governing that defense is federal law, not state law.[1]

2. In this case, the Office of Antiboycott Compliance (OAC) of the Department of Commerce has advised both petitioner and respondent that 15 C.F.R. § 769.2(d) prohibits a bank in the United States from forwarding letter-of-credit documents containing anti-Israel clauses, even if the documents were submitted by a foreign beneficiary. Pet. App. 13a-14a; App., *infra*, 3a-4a.[2] Indeed, the OAC has specifically ruled that petitioner cannot forward the very documents at issue in this case and therefore cannot use them to seek reimbursement. For that reason, petitioner has asserted that it is entitled to the absolute defense against any payment obligation afforded domestic banks in these circumstances under 50 U.S.C. App. § 2407(a)(1)(F).

Respondent claims that the OAC opinion does not reflect the position of the Secretary and is, instead, merely "an informal letter . . . from a junior Commerce Department official," "an informal reading of the Antiboycott Regulations by a junior bureaucrat at the Commerce Department," "a junior bureaucrat's misreading of the law,"

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[1] Respondent accuses petitioner of concocting a defense under the Antiboycott Regulations to avoid payment. Respondent forgets that it—not petitioner—inserted the anti-Israel language in the letter of credit documents at issue. Respondent also forgets that it is the Office of Antiboycott Compliance—not petitioner—that has ruled that 15 C.F.R. § 769.2(d) prohibits petitioner from forwarding respondent's documents for reimbursement. Finally, respondent forgets that petitioner has already paid respondent millions of dollars on documents that did not have an antiboycott defect. Petitioner has concocted nothing; it is entitled to a defense under federal law due to respondent's insertion of anti-Israel language into the letter of credit documents.

[2] The Appendix to this Brief consists of a portion of the appendices, located at R. 884, to the brief in support of summary judgment that respondent filed in the Superior Court of Fulton County. Specifically, the Appendix consists of an affidavit filed by counsel for respondent and Exhibits "C," "D," and "E" thereto.

and "[t]he junior bureaucrat's opinion . . . not endorsed by any more senior Commerce Department official." Br. in Opp. 4, 6, 12; *see id.* at 11. That contention lacks merit as a matter of fact and law.

The position taken by the OAC in this case represents the considered judgment of the agency. Respondent itself during the course of this litigation directed inquiries to officials at every level of the agency from the Director on down, and the OAC repeatedly adhered to its position that 15 C.F.R. § 769.2(d) applies to domestic banks engaged in letter-of-credit transactions in the United States, even if those transactions involve a foreign beneficiary. App., *infra*, 1a-17a. Moreover, the record in this case shows that the OAC has enforced its position that 15 C.F.R. § 769.2 (d) applies to letter-of-credit transactions by issuing fines under that section to persons who violate it in the letter-of-credit setting. R. 420-25; Supp. R. 69, 135, 680-81. Finally, respondent acknowledged in a letter to the OAC that "we understand that *OAC* also believes that transmittal of the documents to Iraq is prohibited by Section 769.2(d) . . . ." App., *infra*, 14a (emphasis added). Accordingly, the OAC's determination that Section 769.2 (d) applies to letters of credit is hardly the offhand opinion of a "junior bureaucrat."

In any event, if the Court had any doubt on this score the appropriate course would be to invite the Solicitor General to express the views of the United States on this matter. That course also is an appropriate one in light of the nature of the legal issue involved. The question presented in the petition involves the interpretation of a federal agency's regulations, and it is well settled that "the administrative interpretation" in such circumstances is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945); *see also, e.g., Stinson v. United States*, 113 S. Ct. 1913, 1919

(1993).[3] For these reasons, the Court should call for the views of the Solicitor General if the Court were to have any doubt about the OAC's view of the question in this case.

The amicus brief filed by the U.S. Council on International Banking and the Institute of International Banking Law and Practice, Inc., on behalf of more than 370 banks underscores the importance of the question pre-

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[3] Respondent contends that OAC is wrong in applying Section 769.2(d) to letters of credit, because respondent believes Section 769.1(d)(20) makes Section 769.2(f)—which exempts foreign beneficiaries—the exclusive source of letter of credit regulation, and that no other regulation, including Section 769.2(d), can be applied to letter of credit transactions.

Respondent's interpretation, however, is not the only, or even the most logical, interpretation permitted by the regulations. Respondent fails to tell the Court that 15 C.F.R. § 769.2(d)(18) specifically defines a United States bank's implementation of any letter of credit in the United States (without any exception for letters of credit involving foreign beneficiaries) to be an activity in United States commerce. *See* 15 C.F.R. § 769.2(d)(18). The OAC has concluded that its regulatory authority over boycott activities in United States commerce vests it with the power to prohibit United States banks from forwarding anti-Israel language in any letter of credit setting, even where foreign beneficiaries are involved. The mere fact that a separate provision, 15 C.F.R. § 769.2(f), states that its requirements apply only to United States beneficiaries does not necessarily prevent the OAC from applying the separate requirements of 15 C.F.R. § 769.2(d) more broadly. If respondent is aggrieved by this view in this case, it is respondent, not petitioner, who must mount any challenge.

In addition to OAC's determination that 15 C.F.R. § 769.2(d) applies to letter-of-credit transactions involving foreign beneficiaries, at least one commentator has expressed the same view. *See* Howard N. Fenton, III, *Compliance Comments, Letter of Credit Handling Versus Banks' Other Activities; Banks May Yet Face Double Charges for Single LC Transactions*, Boycott Law Bulletin (June 1985), p. 19; Howard N. Fenton, III, *Compliance Comments, Exempting Banks for Forwarding LC Documents May be Good Policy, But It's Not the Law; A Response to John Ellicott*, Boycott Law Bulletin (Nov. 1985), p. 15.

sented. As amici have explained, they account for more than 95% of the $200 billion outstanding in letters of credit and confirmations reported to federal regulatory officials, and they have a critical need to rely on the views of the OAC as to the meaning and application of the anti-boycott laws. The ruling below creates uncertainty in an area that must be clearly defined in order for the amici to engage in letter-of-credit transactions without fear of massive, and unexpected, liability. *See* Amici Curiae Br. 9. The decision below therefore should not go uncorrected based on the misplaced disparagement of the OAC's conclusion that respondent has advanced.

3. Petitioner submits that federal law vests it with an absolute defense to payment because the Antiboycott Regulations prohibit transmittal of the letter-of-credit documents. Respondent claims that no provision of the Antiboycott Regulations applies to this case. Br. in Opp. 7. The OAC, however, has ruled directly to the contrary. Respondent also argues that the literal text of the letters of credit does not violate the Antiboycott Regulations. Br. in Opp. 7. That is true, but immaterial. The supporting documents transmitted by respondent to implement the letters of credit contain declarations prohibited by the regulations, so petitioner cannot forward these documents and obtain reimbursement. Under these circumstances, federal law (if not also the commercial law of Georgia, for that matter) entitle petitioner to an absolute statutory defense to any payment obligation, regardless of what is written in the letter of credit.

Respondent's reliance on common law letter of credit principles is both wrong and irrelevant. Nothing in letter of credit independence principles allows a beneficiary to demand payment based on documents that—due to the beneficiary's inclusion of extraneous language—are worthless and frozen in the bank's hands. *See* Amici Curiae Br. 2-6. No bank absorbs the risk that a beneficiary will hobble the bank in this way.

More importantly, the question in this case is what happens to a bank when a beneficiary gives a bank documents that the bank cannot forward under the Antiboycott Regulations—*viz.*, must the bank pay? 50 U.S.C. App. § 2407(a)(1)(F) answers that question "no." Even if payment would otherwise be required under state law, the bank is expressly insulated by federal law from that liability where it cannot seek reimbursement due to compliance with the Antiboycott Regulations. That is the case here.

4. Respondent argues that petitioner should pay respondent, and then should challenge the OAC position in federal court. Br. in Opp. 11-12. This bizarre solution —which would place petitioner at risk of absorbing an $18 million liability if such a suit were unsuccessful—is scarcely the result dictated by the statute. 50 U.S.C. App. § 2407(a)(1)(F). The statute says that petitioner is relieved of the obligation to pay when it complies with the regulations and ceases to proceed with a letter-of-credit transaction; the statute does not require petitioner to pay and then sue the federal agency to lift the prohibition that interferes with completion of the transaction. Moreover, any such "pay first, sue later" rule would wreak havoc on the domestic banking community, as amici have explained, since banks must be able easily and quickly to gauge their liability on letter-of-credit transactions in order to remain competitive in the international market. *See* Amici Curiae Br. 3 n.3. Respondent's self-serving proposal is therefore no solution at all.

* * * *

## CONCLUSION

For the foregoing reasons and those given in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

WALTER W. DRIVER, JR.
RICHARD A. SCHNEIDER
*Counsel of Record*
PAUL J. LARKIN, JR.
JAMES W. BOSWELL
KING & SPALDING
191 Peachtree Street
Atlanta, Georgia 30303-1763
(404) 572-4600
*Counsel for Petitioner*

July 26, 1994

**APPENDIX**

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

---

Civil Action File No. D-90676

SMS HASENCLEVER, GMBH,
*Plaintiff,*

-v-

BANCA NAZIONALE DEL LAVORO,
*Defendant.*

---

AFFIDAVIT OF PATRICK M. NORTON

Personally appeared before, the undersigned officer duly authorized by law to administer oaths, PATRICK M. NORTON, who being duly sworn, states as follows:

1. My name is PATRICK M. NORTON. I am over 18 years of age and suffer from no legal disability. I have personal knowledge of the facts stated herein and if called as a witness, can competently testify thereto.

2. My law firm is counsel to SMS Hasenclever, GmbH ("SMS"), Plaintiff in the above-captioned lawsuit.

3. By letter dated December 17, 1990, I wrote to the Atlanta office of Defendant Banca Nazionale del Lavoro ("BNL") on behalf of SMS demanding that BNL acknowledge its obligations pursuant to BNL Letters of Credit ("L/C") Nos. 11751 and 11752 to honor certain documentary presentations of SMS. A true and correct copy of the letter of December 17, 1990 is attached to Plaintiff's First Amended Complaint as Exhibit 11.

4. Counsel to BNL responded to my letter of December 17, 1990 by a letter dated February 26, 1991. A true

and correct copy of BNL's letter of February 26, 1991 is attached to Plaintiff's First Amended Complaint as Exhibit 12.

5. By letter dated April 5, 1991, I transmitted, on behalf of SMS, a copy of Treasury Department License No. IQ-0048 to counsel for BNL. A true and correct copy of the letter of April 5, 1991 is attached to Plaintiff's First Amended Complaint as Exhibit 14.

6. By letter dated May 6, 1991, I transmitted, on behalf of SMS, a copy of amended Treasury Department License No. IQ-0048(a) to BNL. A true and correct copy of the letter of May 6, 1991 is attached to Plaintiff's First Amended Complaint as Exhibit 17.

7. By letter dated November 15, 1991, I wrote counsel for BNL proposing, *inter alia,* that SMS submit to BNL new invoices for SMS's shipments to Iraq of June 20, 1990 omitting the negative origin statements that appeared in the original invoices. A true and correct copy of the letter of November 15, 1991 is attached hereto as Exhibit A.

8. By letter dated November 18, 1991, counsel for BNL refused to accept new invoices for SMS's shipments of June 20, 1990 on the ground that they would be untimely. A true and correct copy of BNL's letter of November 18, 1991 is attached hereto as Exhibit B.

9. By letter dated May 9, 1991, I wrote on behalf of SMS to William Skidmore, Director of the Office of Antiboycott Compliance ("OAC") at the United States Commerce Department. That letter requested that OAC confirm that the U.S. Antiboycott Regulations, 15 C.F.R. Part 769, do not apply to the implementation of BNL L/C No. 11751 and 11752 in accordance with the terms of Section 769.2(f)(6) and requested an opportunity to discuss the matter with Mr. Skidmore. A true and correct copy of my letter of May 9, 1991 is attached as Exhibit C hereto.

10. A staff member of OAC replied to my letter of May 9, 1991 by telephone. No written reply was ever received. In the telephone conversation is was agreed that a meeting would be held at OAC's offices to discuss the subject matter of my letter of May 9, 1991.

11. On May 14, 1991, Dr. Ulrich Trost, inhouse counsel for SMS, AG, the parent of SMS, and I met with Ms. Mary Martin of the OAC staff in Ms. Martin's offices at the Commerce Department in Washington, D.C. Ms. Martin acknowledged that the prohibitions of Section 769.2(f) of the Antiboycott Regulations did not apply to implementation of BNL L/C Nos. 11752. She said, however, that OAC interpreted Section 769.2(d) of the Antiboycott Regulations as including prohibitions separate and apart from the prohibitions of Section 769.2(f) and not subject to the exemptions of Section 769.2(f)(6). Despite repeated requests from Dr. Trost and myself, Ms. Martin offered no explanation of how this interpretation could be reconciled with the plain language of the Regulations and the legislative history of the statutory authority for those Regulations. She was also unable to identify anyone at the U.S. Commerce Department who was willing or able to make this explanation.

12. In early November 1991, I telephoned Ms. Martin to request a meeting with Mr. Skidmore to discuss OAC's "interpretation" of Sections 769.2(d) and (f) of the Antiboycott Regulations. Ms. Martin telephoned me back shortly thereafter and advised me that Mr. Skidmore saw no purpose to be served by such a meeting.

13. By letter dated November 15, 1991, I wrote Mr. Skidmore again, articulating once more why SMS believed that OAC's reported "interpretation" of Sections 769.2(d) and (f) of the Antiboycott Regulations could not be reconciled with the text of the Regulations or the legislative history of their statutory authority and, again, requesting a meeting with Mr. Skidmore at his convenience. A true and correct copy of the letter of November 15,

1991 is attached hereto as Exhibit D. No written reply to my letter was ever received.

14. On December 4, 1991, Mr. William Arvin, Director of the Policy Division of OAC, telephoned me in response to my letter of November 15. I explained SMS's position again to Mr. Arvin at length. Mr. Arvin promised to discuss the issue with Mr. Skidmore and contact me again promptly. On December 10, 1991, not having heard from Mr. Arvin, I telephoned him again. Mr. Arvin advised me that he had not spoken yet to Mr. Skidmore about this matter and promised to do so and call me back the same day.

15. During the week of December 16, 1991, still not having heard from Mr. Arvin, I telephoned him once more. Mr. Arvin said that Mr. Skidmore still saw no purpose to be served by a meeting. Once again, I requested that OAC at least explain how its interpretation of the Regulations could be reconciled with the text of the Regulations and the statute's legislative history. Mr. Arvin was unable or unwilling to do so.

16. By letter dated January 14, 1992, I wrote Mr. Skidmore a final time explaining SMS's position. I noted that I had repeatedly requested OAC, both orally and in writing, to explain its interpretation of the Regulations, and that OAC had not even offered an explanation. I said that, in the absence of such an explanation, SMS was compelled to conclude that OAC's interpretation could not be reconciled with the terms of the Antiboycott Regulations or with the statutory authority underlying those Regulations. A true and correct copy of the letter of January 14, 1992 is attached hereto as Exhibit E. OAC has never replied to my letter of January 14, 1992.

17. Attached hereto as Exhibits F and G respectively, are true and correct copies of the exchange rate quotations from the *Wall Street Journal* for July 13, 1990 and November 16, 1990, the dates on which B&L [*sic*] dishonored SMS's presentations under L/C 11751, one of the

two letters of credit at issue in this case. These quotations are well-known, reliable and accurately reflect the international exchange rates on the dates referenced therein.

18. Attached hereto as Exhibit H is a true and correct copy of worksheets reflecting the calculation of prejudgment interest due and owing on L/C 11751 and L/C 11752 from the July 11, 1990 and the November 13, 1990 dates of presentment. These calculations reflect the total prejudgment interest due and owing on the amounts claimed in Counts I-IV of the First Amended Complaint as of October 1, 1992 and the daily rate of interest that will continue to accrue on each of these claims until the date of judgment.

I have read the above affidavit consisting of 5 pages and swear that the facts set forth herein are true and correct.

/s/ Patrick M. Norton
PATRICK M. NORTON

(Notary Omitted in Printing)

EXHIBIT C

ALSTON & BIRD

One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309-3424

404-881-7000

Patrick M. Norton Direct Dial: 404-881-7882

May 9, 1991

Mr. William Skidmore
Director
Office of Anti-Boycott Compliance
Bureau of Export Administration
United States Department of Commerce
Washington, D.C.

Attn: Ms. Mary Martin

Dear Mr. Skidmore:

On behalf of my client SMS Hasenclever GmbH ("SMS"), I would like to request the opportunity to discuss with you the applicability of the Department's Anti-Boycott Regulations, 15 C.F.R. Part 769, to certain demands for payment by SMS under letters of credit issued by the Atlanta, Georgia branch of the Banca Nazionale del Lavoro ("BNL").

*Background*

SMS is a German corporation with no office or other presence in the United States. Pursuant to a July 1988 contract, SMS agreed to sell certain machinery to an Iraqi corporation. The machinery in question was manufactured in Germany, exported from the port of Hamburg, shipped to Aqaba, Jordan, and then transported overland by truck to Iraq. It never entered United States commerce in any respect.

Under the July 1988 contract, SMS was paid 20% in advance and the balance in stages. The subsequent payments were to be secured by two letters of credit, one denominated in U.S. Dollars and one in Deutschmarks, confirmed by a United States bank. The Iraqi party caused these letters of credit to be issued by the Central Bank of Iraq and confirmed by BNL, Atlanta in BNL's L/C Nos. 11751 and 11752, copies of which are attached.

Under paragraph A of each of the letters of credit, SMS is entitled to up to 60% of the value of a shipment of machinery payable aganist the presentation of specified documents. These documents include a signed commercial invoice, the original of which "must be attested by Iraqi Consulate Chamber of Commerce [sic]." A note on page 3 of each letter of credit provides that the "attestation [must be] by the Iraqi Commercial Attache or his representative in the Iraqi Diplomatic or Consular representation [sic] in the country of origin."

SMS made six shipments of machinery to Iraq under the July 1988 contract. In each instance, the Iraqi consulate in Hamburg required, as a condition to its attestation of SMS's commercial invoice, that the invoice be stamped with a certification that the goods were not of Israeli origin (a "negative certification").

In May 1990, BNL honored SMS's documents for the first two shipments, including invoices with negative certifications. In June 1990, SMS made two additional shipments. BNL dishonored SMS's demands for payment with respect to these shipments on the ground that inclusion of the negative certifications in SMS's invoices prohibited payment under the Anti-Boycott Regulations. SMS and its correspondent bank, Dresdner Bank, immediately objected to this dishonor. While this disagreement was pending, SMS made two more shipments of machinery to Iraq and two corresponding documentary presentations to BNL, each of which included an original invoice with a negative certification.

Four SMS demands for payment under BNL L/C Nos. 11751 and 11752 were thus pending when Iraq invaded Kuwait and, in response, President Bush issued Executive Order 12722 of August 2, 1990 freezing Iraqi assets. The Treasury Department's Office of Foreign Assets Control ("OFAC") construed this freeze to preclude payment under any letter of credit for which Iraq or an Iraqi party was an account party. OFAC indicated in a General License, however, that it was prepared to license on an individual basis payment for exports to Iraq that had occurred prior to August 2, 1990. 31 C.F.R. § 575.510. SMS applied for and was granted such a license. A copy of OFAC License No. IQ-0048 of April 5, 1991 is attached.

On April 8, 1991, SMS re-presented to BNL, via Dresdner Bank, all of its documents required for payment for the four shipments that had been made in the summer of 1990. BNL dishonored those presentations on April 18, 1991, arguing again that payment was prohibited by the Anti-Boycott Regulations.

*Applicability of the Anti-Boycott Regulations*

We believe that SMS's pending demands for payment under BNL's L/C Nos. 11751 and 11752 present two basic questions under the Anti-Boycott Regulations.

1. Is BNL prohibited from paying SMS's demands under Section 769.2(f)?

2. Is BNL prohibited by Section 769.2(d) from forwarding SMS's commercial invoices to the Iraqi issuing bank?

1. *The prohibition against paying SMS's demands is inapplicable.*

Section 769.1(d)(20) of the Anti-Boycott Regulations specifies that reference should be made to Section 769.2(f) "to determine the circumstances in which paying, honoring, confirming, or otherwise implementing a letter of credit is covered by this part." Section 769.2

(f)(1) provides that "no United States person may pay, honor, confirm, or otherwise implement a letter of credit which contains a condition or requirement compliance with which is prohibited by this part . . . ." The reference to "this part" in both sections refers to Part 769 and indicates that the provisions of Section 769.2(f) are intended to be a comprehensive statement of the conditions under which payment or honoring a letter of credit is prohibited by the Anti-Boycott Regulations.

Section 769.2(f)(6) then provides that the prohibitions of Section (f) apply "only when the transaction to which the letter of credit applies is in United States commerce and the beneficiary is a United States person." The prohibitions of Section (f), and hence the prohibitions of all of Part 769, do not, accordingly, apply to SMS's demands under BNL's letters of credit since: (1) the "transaction to which the letter of credit" applies was never in United States commerce in any respect; and (2) the "beneficiary," SMS, is not a "United States person."

2. *The prohibition against furnishing information about business relationships with boycotted countries is inapplicable to BNL's implementation of SMS's letter of credit.*

It has been suggested that, whether or not BNL is prohibited by Section (f) from paying SMS's demands, BNL may be prohibited by Section (d) from forwarding SMS's invoices with the negative certifications to the issuing Iraqi bank. We believe this suggestion is inaccurate for several reasons.

First, as noted above, Section 769.1(d)(20) and Section 769.2(f)(1) indicate that the prohibitions of Section (f) constitute a comprehensive statement of all of the anti-boycott prohibitions applicable to letters of credit under "this part," i.e., *all* of Part 769. It would be inconsistent with these provisions to construe Section (d) as an additional impediment to payment of a letter of credit demand.

This conclusion is confirmed by the definition of "implementing" in Section (f)(2) of the Regulations. Section (f)(1) states that "no United States person may pay, honor, confirm *or otherwise implement* a letter of credit" with the prohibited conditions (emphasis added). "Implementing" is defined in paragraph (2) to comprise a broad range of actions, including "taking any other action to implement a letter of credit." "Implementing" is thus defined so as to subsume *all* activities normally attendant upon payment of a demand under a letter of credit, including, we believe, a confirming bank's transmittal of documents to an issuing bank. The exemption of Section (f)(6) should therefore extend to the transmittal of those documents.

Secondly, the prohibition against furnishing information about business relationships with boycotted countries in Section (d) should not apply to SMS's transmittal of a payment document because BNL lacks the requisite intent to further the boycott. Paragraph (d)(5) provides that the prohibition of Section (d), like all other prohibitions in Part 769, applies "only when such activities are undertaken with intent to comply with, further, or support an unsanctioned foreign boycott." Although in presenting the negative certifications SMS was acting in response to an Iraqi request, BNL was not. Under these circumstances, we do not believe that an intention to comply with the boycott may be imputed to BNL.

Under applicable letter of credit law, moreover, a confirming bank has no responsibility for the content of the documents presented under the letter of credit. Thus, Article 17 of the Uniform Customs and Practice for Documentary Credits, applicable to L/C Nos. 11751 and 11752 pursuant to page 5 of each, provides that "*banks assume no liability or responsibility for the* form, sufficiency, accuracy, genuineness, falsification or *legal effect of any documents, or for the general and/or particular conditions stipulated in the documents or superimposed thereon*" (emphasis added). It would be contrary to this fundamental tenet of letter of credit law to impute to

BNL an intent to further the boycott simply by virue of transmitting SMS's documents to the Iraqi issuing bank.

More generally, Sections (d) and (f) of the Anti-Boycott Regulations evidence a policy of avoiding application of otherwise applicable prohibitions to transactions and parties outside U.S. jurisdiction. The prohibitions of those Sections—and, indeed, all the prohibitions in the Regulations—apply only to "United States persons." The letter of credit prohibitions in Section (f) go further and specifically exclude extraterritorial transactions and beneficiaries. It would be inconsistent with this basic policy to construe the Regulations to apply in any respect to payment of a letter of credit demand where: (1) the underlying transaction is wholly outside United States commerce; (2) the beneficiary is not a "United States person"; (3) the beneficiary prepared and executed documents wholly within a foreign jurisdiction and in accordance with the law of that jurisdiction; (4) the Regulations would not have prohibited the direct transmittal of the documents from the beneficiary to Iraq; and (5) the sole connection of the letter of credit transaction to United States jurisdiction is the transmittal by a bank of documents for whose content the bank has no legal responsibility.

We have requested the opportunity to discuss this matter with you and understand that you will be available to do so on Tuesday, May 14, at 1:30 P.M. I shall attend that meeting together with Dr. Ulrich Trost, General Counsel to SMS's parent corporation, SMS Schloemann-Siemag Aktiengesellschaft.

We very much appreciate your attention to our request.

Sincerely yours,

/s/ Patrick M. Norton
PATRICK M. NORTON

PMN/shh

EXHIBIT D

ALSTON & BIRD

One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309-3424

404-881-7000

Patrick M. Norton Direct Dial: 404-881-7882

November 15, 1991

Mr. William Skidmore
Director
Office of Antboycott Compliance
Bureau of Export Administration
Department of Commerce
Washington, DC 20230

Dear Mr. Skidmore:

In a letter dated May 9, 1991 (copy attached), I related to you the efforts of my client SMS Hasenclever, a German corporation, to collect certain payments from the Atlanta office of the Banca Nazionale del Lavoro (BNL) pursuant to two letters of credit issued by that bank, and the contention of BNL that payment was precluded by the antiboycott provisions of the Export Administration Act. On May 14, Ms. Martin and Ms. Gore of your Office very kindly met with the General Counsel of SMS, Dr. Ulrich Trost, and myself to discuss OAC's position on this matter. Recently, I asked Ms. Martin whether OAC would be interested in discussing this matter again in the light of several new developments. Ms. Martin has informed me that she has discussed this matter with you and that you see no purpose to be served by such a meeting.

We respectfully request that you reconsider this decision. We continue to believe that there are serious legal questions as to the applicability of the antiboycott provisions of the Export Administration Act to the transactions

at issue here. At the very least, we believe we are entitled to a fuller explanation of OAC's position in this regard than we have had thus far. The practical effect of OAC's current position, moreover, will be to reward the Government of Iraq at the expense of either SMS or BNL. We seriously doubt that this is in the best interests of the United States and wish to be sure that, before taking a final position in this matter, you have fully considered this eventuality.

My letter of May 9 explains the background to this problem, and I will not repeat it here. I also understand that you will be receiving additional information from counsel to BNL. For present purposes, however, I believe it is useful to summarize the situation briefly as follows:

In June 1990, SMS exported from Germany to Iraq two shipments of machinery and equipment worth more than $20 million. (Other shipments under the same contract have now been paid for and are no longer at issue.) The exports were in accordance with German law in every respect. Pursuant to two letters of credit issued by BNL Atlanta, SMS was entitled to 60% of the value of the shipments against the presentation of shipping documents, and SMS presented those documents to BNL Atlanta in July 1990. From August 2, 1990, payment was prohibited by the freeze of Iraqi assets pursuant to Executive Orders 12722 and 12724. After thorough consideration of the matter, the Department of the Treasury authorized payment to SMS in OFAC License No. IQ-0048.

SMS's shipping documents included "negative origin statements," which SMS was advised by authorities in Hamburg, the port of export, were mandatory for shipments to Iraq. BNL has refused to honor SMS's documents on the grounds that under 15 C.F.R. Sec. 769.2(d) the inclusion in SMS's documents of negative origin statements precludes BNL from forwarding the documents to the Central Bank of Iraq for reimbursement, and that the

inclusion of such statements therefore renders the documents non-conforming. From various correspondence between OAC and ourselves and OAC and BNL, we understand that OAC also believes that transmittal of the documents to Iraq is prohibited by Section 769.2(d), despite the terms of Section 769.2(f)(6), which appear to exempt the implementation of the letters of credit at issue here from all of the prohibitions of the Antiboycott Regulations.

My letter of May 9 explains why we do not believe that OAC's apparent interpretation of the Regulations is consistent with the terms of the Regulations themselves. I will not repeat those arguments but wish to note that, despite repeated inquires, written and oral, we have been unable to obtain an explanation of this apparent inconsistency. I would also like to call your attention to Senate Report No. 95-104, explaining the Senate's intention in enacting the antiboycott provisions of the Export Administration Act Amendments of 1977. At page 41 of that report there is a discussion of the letter of credit provisions of the statute. That discussion states:

> "As is also the case with all other prohibitions of the bill, the transaction in question must be in the interstate or foreign commerce of the United States before the bill applies. Hence, it will be necessary in the first instance to determine whether the transaction to which the credit applies involve the interstate or foreign commerce of the United States. A further threshold question in each case is whether the beneficiary is a U.S. person. *If the beneficiary is not a U.S. person or the transaction in question does not involve U.S. commerce, the bill would not apply.*"

[Emphasis added.] If I read this passage correctly, it was the understanding of the Senate that the *statute itself, in toto,* did not apply if either (1) the underlying transaction was not in U.S. commerce, or (2) the bene-

ficiary was not a U.S. person—conditions both satisfied in this instance.

Legal authority aside, the application of OAC's interpretation of the Regulations to the present transaction leads to practical results that can hardly be compatible with U.S. interests. SMS has now brought suit against BNL in Georgia state courts seeking an order directing BNL to pay SMS against its documents. One of two results is probable: (1) SMS's documents will be deemed non-conforming, and SMS will be denied payment under BNL's letters of credit; or (2) BNL will be directed to pay SMS but will be unable to seek reimbursement from the Central Bank of Iraq. Either a German corporation or an Italian bank will thus incur a major loss, and only *Iraq* will benefit. The Central Bank of Iraq will be relieved of all exposure under its letters of credit with BNL, and the Iraqi Government will have received tens of millions of dollars in equipment for which it will not have to pay. We find it difficult to believe that the Executive Branch would intend or welcome this result. We also seriously doubt that, in enacting the antiboycott provisions of the Export Administration Act, Congress ever intended such an outcome.

We would be interested in discussing these points further with you directly. Please advise me if a meeting for this purpose would be convenient to you at some time in the next few weeks.

Sincerely yours,

/s/ Patrick M. Norton
PATRICK M. NORTON

PMN/shh

EXHIBIT E

ALSTON & BIRD

One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309-3424

404-881-7000

Patrick M. Norton Direct Dial: 404-881-7882

January 14, 1992

Mr. William Skidmore
Director
Office of Antboycott Compliance
Bureau of Export Administration
Department of Commerce
Washington, DC 20230

Re: SMS Hasenclever GmbH ("SMS")

Dear Mr. Skidmore:

In a letter dated May 9, 1991, I wrote to you concerning the applicability of the Department's Antiboycott Regulations to certain demands for payment by SMS under letters of credit confirmed by the Atlanta branch of the Banca Nazionale del Lavoro ("BNL"). On May 14, 1991, Ms. Martin and Ms. Gore from your office met with the general counsel of SMS's parent corporation and myself to discuss OAC's position in this regard. In a further letter to you, dated November 15, 1991, I reiterated SMS's concerns and requested a meeting with you to discuss this matter. Your staff have advised me that you see no purpose to be served by such a meeting. I would, therefore, like to summarize the situation as I understand it.

SMS is a German corporation with no office or other presence in the United States and, accordingly, is not a "United States person" within the meaning of the Anti-

boycott Regulations. The underlying transaction to which the BNL letters of credit apply is not in "United States commerce" within the meaning of the Regulations. OAC has confirmed our view that, as a consequence, the prohibitions of Section 769.2(f) of the Antiboycott Regulations do not apply to SMS's demands for payment from BNL or to BNL's implementation of those demands.

OAC has, however, indicated that it would regard BNL's transmtission to the Iraqi issuing bank of certain SMS documents with "negative origin statements" as violative of the prohibition in Section 769.2(d) of the Regulations. This position was most clearly stated in a letter from Ms. Martin to counsel for BNL dated January 18, 1991. In my letters of May 9 and November 15 and in numerous conversations with your staff, I have explained that OAC's position in this regard appears to be directly inconsistent with the plain terms of Sections 769.1(d)(20), 769.1(f)(1), and 769.2(f)(6) of the Regulations themselves. It also appears to contradict Congress's very explicit intentions in enacting the statutory authority on which the Regulations are based. See, Senate Report No. 95-104, at 41.

I have repeatedly asked OAC, both orally and in writing, to explain how its position can be reconciled with the Regulations and with the legislative history of the statute. Despite these repeated requests, OAC has not even offered an explanation. SMS must, therefore, respectfully conclude that OAC's interpretation of Section 769.2(d) cannot be reconciled with either the terms of the Antiboycott Regulations or with the statutory authority underlying those Regulations.

Very truly yours,

/s/ Patrick M. Norton
PATRICK M. NORTON

(5)

Supreme Court, U.S.
FILED
AUG 1 1994
OFFICE OF THE CLERK

No. 93-2006

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1993

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BANCA NAZIONALE DEL LAVORO,

*Petitioner,*

*v.*

SMS HASENCLEVER GMBH,

*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA AND
THE COURT OF APPEALS OF GEORGIA

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## RESPONDENT'S RESPONSE TO MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

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STEVEN M. COLLINS
*Counsel of Record*
PATRICK M. NORTON
ALSTON & BIRD
One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
(404) 881-7000
*Counsel for Respondent*
August 1, 1994

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The U.S. Council on International Banking and the Institute of International Banking Law and Practice ("Amici") have filed a Motion for Leave to File Brief of *Amici Curiae* ("Motion"). Amici urge the Court to grant Banca Nazionale del Lavoro's ("BNL's") Petition for Writ of Certiorari. They allege that, if the decision of the Georgia Court of Appeals in this case is allowed to stand, there will be apocalyptic ramifications for international banks. Amici's Motion demonstrates an unfamiliarity with both the record and the law at issue in this case and should be denied.

The sole *legal* argument presented in Amici's Motion, as in BNL's Petition, is that the Georgia courts have denied BNL the "safe harbor" granted banks in Section 8(a)(1)(F) of the Export Administration Act ("EAA"), 50 U.S.C. App. § 2407(a)(1)(F). Motion, pp. 7-8. Amici appear to be unaware that, as BNL itself has admitted, this statutory defense is inapplicable by its terms. See, Respondent's Brief in Opposition ("Res. Br."), p. 7.

Amici's other arguments are addressed to alleged effects of the Georgia courts' decision on "the practices and expectations of banks in the United States engaged in international letter of credit transactions."[1] Amici appear to be unaware that the applicable jurisdictional statute and the rules of this Court do not contemplate granting certiorari for this purpose. See, 28 U.S.C. § 1257; U.S. Supreme Court Rules, Rule 10.1(c).

Amici's longest argument is devoted to proving that, as a confirming bank, BNL should have been allowed to dishonor documents if it could not use those documents to obtain reimbursement. Motion, pp. 3-4, n. 4.[2] Amici appear to be unaware

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[1] The quotation appears on the second page of the Motion itself. Other references in the text to Amici's arguments are to pages in the supporting brief.

[2] This argument contravenes fundamental axioms of letter of credit law, embodied in the Uniform Commercial Code, that (a) a confirming bank's obligation to the beneficiary of a letter of credit is wholly independent of its relationship with the bank that issued the credit, and (b) a confirming bank undertakes the risk of non-reimbursement. See, *Hawkland & Holland UCC Series* § 5-114:01 (Art. 5)(1993); *Centrifugal Casting Mach. Co. v. American Bank & Trust Co.*, 966 F.2d 1348, 1352 (10th Cir. 1992). One must question how carefully Amici have considered this argument.

that the entitlement of a confirming bank to dishonor a letter of credit based on alleged reimbursement problems arising out of the beneficiary's documents is an issue of *state* law, which also does not come within the jurisdictional purview of this Court. If Amici believed that the Georgia Court of Appeals had misapplied letter of credit law, they should have intervened before the *Georgia* Supreme Court.

Amici's arguments about the federal policy implications of complying with the Georgia courts' decision betray a fundamental unfamiliarity with both the record and U.S. Antiboycott Regulations. Amici appear to be under the misapprehension, first, that SMS has violated U.S. antiboycott laws by presenting documents with negative certifications to BNL.[3] Motion, p. 3. Amici are evidently unaware that: U.S. Antiboycott Regulations (15 C.F.R. § 769.2(f)(6)) expressly exempt SMS's actions from their prohibitions because SMS is not a U.S. person and because the shipment of goods at issue never entered U.S. commerce; the Commerce Department has confirmed this exemption; and BNL has never disputed it. See, Res. Br., pp. 3-4.

Amici's contention that confirming banks like BNL must be allowed to rely on the "interpretations" of the Commerce Department's Office of Antiboycott Compliance ("OAC") or be caught between violating federal law and incurring liability under state law (Motion, pp. 8-9) fundamentally misconstrues the "interpretation" of the Antiboycott Regulations at issue in this case. Amici appear to be unaware that: the "interpretation" is, in fact, no more than the informal views of a junior bureaucrat; those views are contradicted by the Antiboycott Regulations themselves and the legislative history of the EAA; BNL did not even receive the "interpretation" until *six months after* it had

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[3] Amici also suggest that allowing the Georgia courts' decision to stand would permit letter of credit beneficiaries and account parties to collude in defrauding a confirming bank by submitting documents with negative certifications. Motion, p.3. Once again, Amici are unfamiliar with the record. It is not even *alleged* that such collusion occurred here. If, as a result of the Georgia courts' decision, banks perceive this to be a future problem, they can easily draft around that problem in the credit itself.

dishonored SMS's documents; BNL itself long ago disavowed this interpretation of the Regulations; and BNL has failed, over more than two and a half years, to take any steps to challenge the bureaucrat's obvious misreading of the law. See, Res. Br. at pp. 11-12. Amici, moreover, have surely not fully considered the implications of their argument. Every junior bureaucrat's error or caprice cannot entitle a bank to dishonor tens of millions of dollars in conforming documents under a letter of credit.

Finally, Amici appear to be unaware that the federal government has been fully informed of this litigation all along and has shown no interest in its outcome. OAC, despite requests from BNL, has declined to participate, and the Georgia courts have held that "no reason exists" for joining OAC as a party. Pet. App., pp. 6a-7a. The U.S. Treasury Department, moreover, has *licensed* this litigation and has been served with all briefs and decisions in the case.[4] Although Treasury is the responsible U.S. Government agency, it has evidenced none of Amici's concerns about the implications of the Georgia courts' ruling for international banking.

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[4] Because this lawsuit arguably involves Iraqi interests, Treasury has licensed the litigation (License No. IQ-0243) pursuant to Treasury's Foreign Assets Controls. 31 C.F.R. Part 575. The license requires SMS to file copies of all briefs and court rulings with Treasury.

Amici's Motion is an excellent illustration of why this Court's Rule 37.2 disfavors motions to file *amicus curiae* briefs until after the Court has considered a petition for writ of certiorari and the amicus has had the time to become familiar with the record and the relevant law. The Motion should be denied.

Respectfully submitted,

STEVEN M. COLLINS
*Counsel of Record*
PATRICK M. NORTON
ALSTON & BIRD
One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
(404) 881-7000
*Counsel for Respondent*
*SMS Hasenclever GmbH*[5]

[5] SMS's disclosure of affiliated corporations pursuant to Rule 29.1 appears in Res. Br. at p. ii.